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FACT-FINDING IN LABOR DISPUTES

A SERIES OF ADDRESSES AND PAPERS PRESENTED AT THE SEMI-ANNUAL MEETING OF THE ACADEMY OF POLITICAL SCIENCE IN THE CITY OF NEW YORK, APRIL 11, 1928

EDITED BY
PARKER THOMAS MOON

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Its list of **contributors** includes university and college teachers, politicians, lawyers, journalists and business men in all parts of the United States, and European professors and publicists. It follows the most important movements of foreign politics but gives chief attention to questions of present interest in the United States. On such questions its attitude is nonpartisan. Every article is signed; and every article, including those of the editors, expresses simply the personal view of the writer. Each issue contains careful **book reviews** by specialists, and large numbers of recent publications are characterized in brief **book notes.**

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General
Wales

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1928

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PREFACE

IN this volume are published the addresses and papers presented at the Semi-Annual Meeting (Forty-Eighth Year) of the Academy of Political Science, on April 11, 1928, at the Hotel Astor, New York City.

Considering that a timely and valuable public service might be rendered by the Academy through a discussion of certain legal and economic aspects of the labor problem by experts and by spokesmen of the various interests concerned, the Committee on Program and Arrangements formulated a program centering around the basic problem of "Fact-finding in Labor Disputes". The Morning Session was devoted to a series of addresses, followed by discussion from the floor, on the use of injunctions and the rôle of the courts in labor disputes and on the various fact-finding agencies, governmental and voluntary, which have endeavored to clarify industrial conflicts by means of investigation. At the Afternoon Session the topic of "Trade Union and Employee Representation Plans" was discussed from many different angles by representatives of capital, of management, and of labor, and by distinguished economists. At the Dinner Session a large and representative audience heard five able addresses on "Present Needs in Industry". The program of the three Sessions, in detail, was as follows:

PROGRAM

FIRST SESSION

Wednesday, April 11, 1928, 10 A.M.

North Ball Room, Hotel Astor

TOPIC: Courts or Voluntary Agencies

GEORGE ROBERTS, *Presiding*

1. *Introductory Address.* GEORGE ROBERTS.
2. *Fact-finding in the Coal Industry.* EDWARD T. DEVINE.

3. *The Supreme Court's Control Over the Use of Injunctions in Labor Disputes.* THOMAS REED POWELL.
4. *Industrial Fact-finding as a Function of Government.* RICHARD H. LANSBURGH.
5. *What Has Been Done by British Fact-finding Bodies in Industrial Relations.* JOHN H. RICHARDSON.
6. *The Future of Injunctions in Labor Disputes.* T. YEOMAN WILLIAMS.
7. *Discussion* (under the ten-minute rule). MORRIS HILLQUIT.
8. *Discussion* (under the five-minute rule).

Paper read by title: *The Use of Impartial Machinery in Labor Disputes.* RUSH C. BUTLER.

SECOND SESSION

Wednesday, April 11, 2:30 P.M.

North Ball Room, Hotel Astor

TOPIC: Trade Union and Employee Representation Plans

HENRY R. SEAGER, *Presiding*

1. *Introductory Address.* HENRY R. SEAGER.
2. *Employee Representation: A Warning to Both Employers and Unions.* WILLIAM M. LEISERSON.
3. *Our Experiences with Employee Representation.* HARVEY G. ELLERD.
4. *Union-Management Cooperation in the Railroad Industry.* OTTO S. BEYER, JR.
5. *The Trade Union Attitude Toward Fact-finding Bodies.* K. C. ADAMS.
6. *Discussion* (under the ten-minute rule). HERMAN OLIPHANT. HENRY S. DENNISON.
7. *Discussion* (under the five-minute rule).

THIRD SESSION

SEMI-ANNUAL DINNER MEETING

Wednesday, April 11, 7 P.M.

Grand Ball Room, Hotel Astor

TOPIC : Present Needs in Industry

SPEAKERS

HALEY FISKE, *Presiding*
RUSH C. BUTLER
B. SEEBOHM ROWNTREE
FELIX FRANKFURTER
DONALD R. RICHBERG

The following brief "Who's Who" of the speakers who participated in the meeting and whose contributions are published in this volume may serve the convenience of readers, despite the brevity required by limitations of space. The names are arranged in alphabetical order, rather than according to the sequence of speakers on the program.

K. C. ADAMS, whose address at the Afternoon Session presented "The Trade Union Attitude Toward Fact-finding Bodies" (see pp. 128-138), is Director of Research for the United Mine Workers of America.

OTTO S. BEYER, JR., whose address on "Union-Management Cooperation in the Railroad Industry" (see pp. 120-127) was a feature of the Afternoon Session, is consulting engineer for the Standard Railroad Unions and was personally active in the inauguration of the employee representation plan on the Baltimore and Ohio Railroad.

WARREN S. BLAUVELT, of the Hudson Valley Coke and Coal Products Corporation, Troy, N. Y., contributed to the discussion at the Afternoon Session (see pp. 147-148).

RUSH C. BUTLER, senior member of the law firm of Butler, Lamb, Foster and Pope, was retained by the Interstate Commerce Commission during the years 1908 to 1914 to represent

the public interest in the investigation of relations between coal-carrying railroads and coal operators under the terms of the Tillman-Gillespie resolution. Mr. Butler is President of the Illinois State Bar Association and Chairman of the American Bar Association's Committee on Commerce. At the Dinner Session Mr. Butler delivered an address on anti-trust legislation (see pp. 156-161); he also contributes to this volume a paper, read by title at the Morning Session, on the subject of "Industrial Arbitration" (see pp. 178-184).

STUART CHASE, who took part in the discussion at the Afternoon Session (see pp. 145-147), was a partner of Harvey S. Chase and Company, certified public accountants, in Boston until 1917; during the ensuing five years he was occupied with the investigation of the meat-packing industry under the Federal Trade Commission; and since 1922 he has been with the Labor Bureau. He is the author of *The Tragedy of Waste* and joint author of a widely read volume entitled *Your Money's Worth.*

JULIUS HENRY COHEN, who participated in the discussion at the Morning Session (see pp. 88-89), is a member of the law firm of Cohen, Gutman and Richter, of New York City, and author of several important books on legal and labor problems, notably: *Law and Order in Industry* (1916); *The Law —Business or Profession* (1916); *The League to Enforce Industrial Peace* (1917); *Commercial Arbitration and the Law* 1918); and *American Labor Policy* (1919).

HENRY S. DENNISON, President of the Dennison Manufacturing Company of Framingham, Mass., is a distinguished pioneer in matters of industrial management and employee representation. Mr. Dennison participated in the discussion at the Afternoon Session (see pp. 141-144).

EDWARD T. DEVINE, Dean of the Graduate School of the American University, addressed the Morning Session on the problem of "Fact-finding in the Coal Industry" (see pp. 5-13). Dr. Devine served on the United States Coal Commission of 1922-1923; he is the author of *Coal—Economic Problems of the Mining, Marketing, and Consumption of*

Anthracite and Soft Coal in the United States (1925), and has remained in close contact with the situation in the coal industry. For many years Dr. Devine was editor, and subsequently associate editor, of *The Survey;* he was Professor of Social Economy at Columbia University from 1905 to 1919, Director of the New York School of Philanthropy from 1904 to 1907 and from 1912 to 1917, General Secretary of the Charity Organization Society of New York from 1896 to 1912 and Secretary of the same society from 1912 to 1917. During the war he had charge of the Bureau of Refugees and Relief under the American Red Cross Commission to France.

HARVEY G. ELLERD, of the Personnel Department of Armour and Company, recounted the experiences which led to the establishment of the Conference Board system of employee representation in the Armour plant (see pp. 110-119).

HALEY FISKE, President of the Metropolitan Life Insurance Company since 1919 and director of the Chatham and Phenix National Bank and Trust Company, of the Victor Chemical Words, and of the National Surety Company, was the presiding officer at the Dinner Session. A summary of his address is found on pp. 151-155.

FELIX FRANKFURTER, Professor of Law at the Harvard Law School, addressed the Dinner Session on the "Present Needs in Industry" (see pp. 171-177). Professor Frankfurter is the author of *Cases under the Interstate Commerce Act* (1922), *The Oregon Hours of Labor Case*, and *District of Columbia Minimum Wage Cases* (1923), and of numerous contributions to reviews. During the war period Mr. Frankfurter served as assistant to the Secretary of War, secretary and counsel to the President's mediation commission, assistant to the Secretary of Labor, and Chairman of the War Labor Policies Board.

MORRIS HILLQUIT, who led the discussion at the conclusion of the Morning Session (see pp. 84-87), has been engaged in the practice of law in New York since 1893 and was the Socialist candidate for mayor of New York City in 1917. Mr. Hillquit is a member of the National Executive Committee of

the Socialist Party and has been a delegate to several Socialist national conventions and international congresses.

RICHARD H. LANSBURGH, who contributed a paper on "Industrial Fact-finding as a Function of Government" (see pp. 14-19), was formerly Secretary of Labor and Industry of the Commonwealth of Pennsylvania and is now Professor of Industry at the University of Pennsylvania.

WILLIAM L. LEISERSON, Professor of Economics at Antioch College and Chairman of the Board of Arbitration of the Men's Clothing Industry of New York from 1921 to 1923 and of Chicago since 1923, has drawn from practical experience as well as from academic study in preparing his discussion of the challenging topic, "Employee Representation — A Warning to Both Employers and Unions" (see pp. 96-109).

THOMAS REED POWELL, who contributes to this volume a trenchant and documented study of "The Supreme Court's Control over the Issue of Injunctions in Labor Disputes" (see pp. 37-77), is a distinguished specialist on the Supreme Court's decisions. Mr. Powell was formerly Ruggles Professor of Constitutional Law at Columbia University; since 1925 he has been Professor of Law at the Harvard Law School. He has been a frequent contributor to the *Political Science Quarterly*, of which he served as Managing Editor from 1913 to 1916, and to legal periodicals.

MURRAY T. QUIGG, who participated in the discussion at the Morning Session (see pp. 87-88), is the Editor of *Law and Labor*, the organ of the League for Industrial Rights, with offices at 165 Broadway, New York City.

JOHN A. RICHARDSON, a distinguished British economist on the staff of the International Labour Organization at Geneva, came to the United States this year to serve at Columbia University as Visiting Professor of Social Legislation. His address at the Morning Session presented a comprehensive analysis of "What Has Been Done by British Fact-finding Bodies in Industrial Relations" (see pp. 20-34).

DONALD RICHBERG has practised law at Chicago since 1904 and has acted as special counsel for the City of Chicago in gas litigation since 1915, as chief counsel for the railroad unions in the government injunction suit of 1922, and as general counsel for the National Conference on the Valuation of Railroads since 1923. As counsel for the railroad unions he has been actively and intimately concerned with the problems confronting the labor movement. He is the author of *The Shadow Men* (1911), *In the Dark* (1912), *Who Wins in November?* (1916), *A Man of Purpose* (1922), and of numerous articles contributed to magazines and reviews. His witty and yet by no means mainly whimsical address at the Dinner Session expounded the philosophy of "Mutualism" as a remedy for the evils of the existing industrial order (see pp. 185-194).

GEORGE ROBERTS, Chairman of the Committee on Program and Arrangements for this meeting, and presiding officer at the Morning Session, is a member of the law firm of Winthrop, Stimson, Putnam and Roberts, with offices at 32 Liberty Street, New York City.

B. SEEBOHM ROWNTREE, Chairman of the Rowntree Cocoa Works, is an eminent British industrialist and a member of the British Liberal Industrial Inquiry which has recently been engaged in formulating a notable program of industrial reconstruction. As a statesman of industry, coupling a courageous vision with the practical experience of a responsible man of affairs, Mr. Rowntree has a very large number of warm admirers and friends in America as well as in Great Britain. Mr. Rowntree's address on the topic "A Liberal Industrial Policy" was an outstanding feature of the Dinner Session (see pp. 162-170).

HENRY R. SEAGER, Professor of Political Economy at Columbia University and a Trustee of the Academy of Political Science, is an authoritative specialist on labor problems who needs no introduction to readers of these pages. Professor Seager acted as presiding officer at the Afternoon Session (see pp. 93-95).

T. YEOMAN WILLIAMS, who addressed the Morning Session on the topic "Future Injunctions and Labor Disputes" is the Secretary of the League for Industrial Rights (see pp. 78-83).

To the group of distinguished speakers who participated in the Meeting, and whose contributions give this volume its value, the most sincere gratitude and appreciation are due. The officers of the Academy likewise wish to express their indebtedness to the Committee on Program and Arrangements, whose advice and suggestions were of inestimable value in the formulation of a well-balanced program on so many-sided and controversial a subject as the one under consideration. The membership of the Committee was as follows:

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PART I

FACT-FINDING—BY GOVERNMENTAL OR VOLUNTARY AGENCIES

FACT-FINDING IN LABOR DISPUTES[1]

GEORGE ROBERTS

AT first blush it might seem that a discussion of the relations between capital and labor must necessarily be hackneyed, for disputes between capital and labor have existed since civilization began. Certain recent industrial developments, however, lend an unusual degree of significance and timely interest to the topic selected for discussion at this meeting of the Academy of Political Science.

One of these developments is the astounding increase in mass production that has taken place in this country. The Department of Labor recently published a table showing the increase in labor productivity in ten important industries over the period from 1914 to 1925. For rubber tires the increase was 211 per cent; for automobiles, 172 per cent; for petroleum, 83 per cent; for cement, 61 per cent; for iron and steel, 59 per cent; for flour milling, 40 per cent; for paper and pulp, 34 per cent; for sugar refining, 28 per cent; for meat packing, 27 per cent, and for leather tanning, 26 per cent. Other industries show the same trend. In other words, labor-saving devices enable the worker to produce considerably more than he did a few years ago. As a result, the necessary goods are produced by fewer laborers and the laborers so displaced have had to find employment elsewhere.

But perhaps the most remarkable thing in our economic development has been the attitude of organized labor. In Europe organized labor is organized in political parties favoring all sorts of paternalistic and socialistic legislation. In this country, in spite of occasional exceedingly bitter fights, which have almost degenerated into open warfare between capital and labor, as a general thing peace has been recognized as the normal condition of industry, and not infrequently the

[1] Introductory Address delivered by Mr. Roberts as Presiding Officer at the First Session of the Semi-Annual Meeting of the Academy of Political Science, April 11, 1928.

utterances of outstanding labor leaders have been in accord with those of leading capitalists. For instance, Mr. Green, President of the American Federation of Labor, in a statement issued in January, 1928, said:

> Organized labor in the United States challenges the owners and management of industry to cooperate with it in the establishment and maintenance of sound economic standards and industrial peace. We welcome the opportunity of giving our collective skill, training and technique to the development of industrial and individual efficiency. We believe that American living standards and national prosperity can be fostered only through the maintenance of a high industrial productivity level and a high, and still higher, mass purchasing power.

In other words, capital and labor have united to create the present economic condition.

Unfortunately, in recent months several clouds have appeared upon the horizon. The condition in the coal industry has challenged attention. Then, too, there is the general question of unemployment. The amount of unemployment has been variously estimated from 2,000,000 to 8,000,000, and thinking people have suddenly realized that we have no adequate method of finding out how many unemployed there are, and what we should do about it when we do find out. The fact that the unemployment crisis apparently is passing, that the reports from various industries seem to show an increase in business, which means an increase in employment, has really nothing to do with the fact that we have been shown that we have inadequate statistics and that we have inadequate plans to meet an unemployment crisis. It was in consideration of these facts that the Program Committee of the Academy of Political Science decided to attempt to emphasize the importance of fact-finding in labor disputes, whether those disputes have reached the courts or whether they have not.

FACT-FINDING IN THE COAL INDUSTRY

EDWARD T. DEVINE
Dean of the Graduate School, The American University, Washington, D. C.;
Member of the U. S. Coal Commission, 1922-23

THE average intelligent citizen is aware that something is amiss in the coal industry of America. It is fairly well known that five years ago a federal fact-finding commission, appointed by authority of an act of Congress, made an extensive report, with recommendations which have not yet been adopted; that in Jacksonville soon afterwards a wage agreement was made between the soft coal operators and the miners, which has broken down because the union coal companies found it difficult to hold their markets in competition with the non-union operators in West Virginia; that chaotic conditions have now for a long time prevailed in western Pennsylvania and Ohio; that sharp conflicts have occurred in Colorado; that the industry is in a bad way in Indiana, Illinois, and other states; and that collective bargaining — the only hope of the miners for security in regard to their wage scale and working conditions — has lost ground seriously, as measured by the relative amounts of union and non-union coal mined and sold.

It has been necessary to raise relief funds for the families of striking and unemployed miners. Courts have been asked to sanction the eviction of miners' families, to make room for those of non-union miners engaged to take their places. Sweeping injunctions have been issued to prevent interference with the operation of the mines and with the use of the property of the companies; and these have in practice interfered with civil liberties guaranteed by the federal and state constitutions, freedom of speech and assembly, even of worship.

The nation's fuel supply, it is true, has not been interrupted or seriously threatened. There has been no coal shortage. The transportation of coal has not been mismanaged as in some earlier crises. But the notoriously short year of the miners has been violently shortened still further; enormous shifts

have occurred in the source of the coal supply; and there is a wide-spread feeling that this shift is not to be attributed solely to the superior quality of the new supplies or to natural geographic or economic advantages, but that favorable freight rates and unfair wage competition have been the fundamental factors in the dislocation.

It is known that the United States Senate, through one of its standing committees, has been holding public hearings on the coal problem for several weeks, in the course of which representatives of the miners have brought grave charges against both coal companies and railroad corporations, and senators have themselves witnessed distressing scenes in the coal regions. Even those who have followed these hearings attentively, however, would hardly feel that they know what the facts are. Large investors have either said definitely (Mr. John D. Rockefeller, Jr. did) or shown by their testimony that they do not know the facts. They trust their officials and employees. Whether coal companies have or have not violated or abrogated agreements which they were morally bound to maintain (the Pittsburgh Coal Company says that they have not done so); whether the coal companies pay more or less than their fair share of the taxes; whether some railroads have destroyed the prosperity of the mines on their own lines by an uncooperative policy of buying elsewhere at cut prices made possible by non-union operation, as Secretary of Labor Davis is reported to have alleged at the American Mining Congress in 1925; and whether the Pennsylvania Railroad and others have abused their power by coercing coal companies to adopt an open shop, anti-union policy — as to such matters, the average citizen, though intelligent, is not so well informed.

Fact-finding in industry is obviously not a monopoly of the government. In the coal industry owners of the coal measures need certain facts as a basis for deciding about royalty contracts; operators need a much wider range of facts as a basis for wage rate and sales prices; miners need facts for wage demands and agreements and for knowing whether it might be advisable to change their occupation; carriers need facts upon which to base freight rates and extension of facilities; and buyers need facts upon which to judge of prices and values, and the possible resort to substitute fuels. It is a fair assump-

tion, until the contrary is established, that such facts as parties directly interested thus require can be obtained from their own experience or from such sources as are usually open to property owners, operators, workers, carriers and consumers in any competitive industry. Naturally those who are large holders of coal properties, large-scale operators, organized miners or extensive consumers, are in a position to obtain and organize their facts more extensively and more accurately than those whose ownership, operations or purchases are on a smaller scale or who, as workers, do not have the benefit of collective bargaining. However, the aggregate amount of fact-finding by the various factors in the industry for such purely practical purposes in the coal industry will, no doubt, compare favorably with that which will be found in other comparable extractive or manufacturing industries. The United Mine Workers of America would not be at a disadvantage in making any new wage scale because of a lack of information as to what the operators could afford to pay. Through their own technical experts they would ordinarily have information, for example, in regard to any new labor-saving machinery which the operators might desire to introduce, and they would be able to carry on the bargaining process without serious handicap of ignorance concerning the actual mining costs. The railroads and other public utility corporations similarly have their facts in regard to the quality and the characteristics of coal offered to them by various producers at various prices.

Nevertheless, such fact-finding within the industry has serious limitations. The coal companies, the railroads and industrial corporations, and the private individuals or estates who have large holdings, may indeed have at their disposal the service of geologists, engineers and accountants, upon whose facts they can rely, but the individual farmer or other landowner under whose land coal is found has no such resources and may have no practicable alternative to the acceptance of whatever may be proposed by the only operator whose workings are sufficiently near and convenient to justify an offer. A small operator may have no system of cost accounting, and even a large operator may be unable to check up his figures by any adequate comparison with other operators. Non-union miners have only their own observation and ex-

perience and that of their immediate fellows to guide them, and the household consumer is equally unprovided with such facts as would enable him to know whether he is paying a fair price for his coal.

The first ground then upon which we may justify a demand for fact-finding is that so far as small owners, operators, buyers and unorganized miners are concerned, even the elementary facts upon which the give and take of commerce, the haggling of the market, is traditionally predicated, are lacking.

The case is, however, somewhat more serious. It is not merely the ordinary costs, sales realizations, and margins of the operator, carrier and dealer which should be known if the competitive economic forces are to operate freely and with mutual advantage to all concerned. It is also essential to know what special prices are made to favored buyers; what secret arrangements are made; what unnecessary costs are involved in favors to insiders, to relatives or perhaps to officials; what ulterior motives influence carriers, coal owners, operators, or union officials in any policies which are crooked though they may appear straightforward. Overhead costs, as well as actual mining costs, need to be known and taken into account if workers and consumers are really to have a square deal. Investments and profits fall, it is true, under different laws from those of costs and margins; but they are of actual interest to those who mine coal and those who use it. The accumulation of a surplus for the purchase of coal lands or the strengthening of the credit of the company may be sound policy in the case of the coal industry as in the case of railroads, but there is no more reason for secrecy in the one case than in the other, and it can not be alleged that there is equal bargaining power unless such facts are accessible to both parties in any bargaining which the industry requires.

It may be said that the situation in all these respects is not appreciably different from that of other industries in which small producers have to compete with large producers. Why may not the small producers unite among themselves if they have the cooperative inclination and capacity? It is open to miners to organize if they want to bargain collectively and to consumers to form cooperative or municipal fuel yards. Here however we strike our first doubts. Is it in fact open to pro-

ducers, miners or consumers to resort to these obviously appropriate measures? Are there unusual and perhaps insuperable obstacles? Have we in the Sherman anti-trust legislation and in other laws as interpreted by the courts interfered with the free play of competition? Do we by our arbitrary, even if historically understandable, separation of federal and state authority complicate the problem for the individual competitor in the coal industry? Do we in all sections guarantee and adequately protect the rights of the miners to organize and to bargain collectively; or do we, by various devices — company towns, "yellow dog" wage contracts, the form of the company house leases, sweeping injunctions in labor disputes, and the perversion of police authority — virtually destroy the theoretical right to organize? Do the policies of the International Mine Workers of America themselves work in that direction by unduly limiting the autonomy of local districts, seeking to compel an unnatural uniformity which amounts to suicide of the union in sections where, if free to bargain locally, it might survive?

The facts about such questions as these are not such as the consumer, miner, or producer can obtain and substantiate from his individual experience; but they are obtainable. They have been obtained and set forth more than once by journalists, by economists, by foundations, by congressional and legislative investigators and by official commissions. No doubt sensationally exaggerated accounts have been given of particular incidents but the sober facts set forth by the United States Fact-Finding Coal Commission in 1923 will disturb any complacent assumption of the free play of economic forces and the adequacy of the competitive principle as a protection either to worker or to consumer. Such facts were obtained on a large scale for a particular year, at considerable expense, and set forth in perhaps overwhelming detail. They could be obtained regularly and set forth clearly at periodic intervals and at a moderate expense just as the facts about production, sales realization, etc., are now obtained and set forth by the Bureau of Mines.

Fact-finding, I repeat, is not a monopoly of government; nor is it a function merely of the individual factors in the industry for the promotion or protection of their own financial

and economic interests. It depends on the nature of the facts desired and the use to which they are to be put, whether they can best be obtained in one way or another. The general principle would seem to be to leave to individual factors — coal owners, operators, carriers, miners and consumers — the responsibility for observing, collecting, interpreting and using such of the facts as are obtainable by direct experience and observation, or by facilities which they can reasonably be expected to create, and which are useful to them; but to recognize that the coal industry is of such basic importance in the national economic organization, and that fuel is so essential in our domestic economy, that supplementary means are necessary to obtain and make available the facts not thus obtainable by individuals.

We may consider in turn what those supplementary means of fact-finding are. The daily press, the weekly journals of general circulation, and the special organs of the coal industry, whether representing operators, miners or consumers, have perhaps first place in any such enumeration. They obtain facts while they are alive, while they have fresh and vital significance. The motive is of course that of all journalism — the news value to subscribers, the income to be obtained by meeting the news demand. It is a legitimate motive. It serves. It leads to heroic reporting in the face of personal danger, to sustained, creditable plans for educating the public on controversial issues. A free press is, I think, the most important single fact-finding agency. Interference with freedom of the press or its corruption is the gravest of all dangers in the coal industry as in any industry. The steady diminution in the number of independent journals, while it makes those which survive more powerful, increases the risk. If all our eggs are in one basket, we certainly need to watch that basket.

There is a place, secondly, for disinterested, public-spirited inquiries, like that which the Federal Council of Christian Churches is now making in the Pittsburgh district, and which I understand will soon be ready for publication. When human life is imperiled, when there is widespread deprivation and hardship in an industrial controversy, when civil liberties are denied and property is destroyed, when feeling runs high, when moral as well as economic issues are involved, and it is

difficult for the private citizens to follow the facts as reported in the press, and to distinguish fact from fiction, there is a clear obligation to devise some plan for an authoritative, unimpeachable, impartial pronouncement, not only on the facts but if possible also on the moral issues, the social policies involved. To say that such a survey and pronouncement must be fair and impartial is not to say that it must be colorless, or infallible. It can not be free from the possibility of human error and it may not even be the last word on all of the facts. The Protestant Churches, acting through their Federal Council, and the Catholic Church, through its National Welfare Conference, while not assuming any such infallible freedom from the possibility of error, for they are not here pronouncing on religious doctrines, on questions of faith or dogma, may render the greatest possible service not only to their respective members but to the public in general. They are and may insist on being regarded as disinterested. They have created special organs for research and education in the field of industry and social relations. They can not be indifferent to lawlessness whether on one side or the other. Human distress, the need of the hungry and shelterless, of strangers and of prisoners, is their historic problem — recognized as such by Mosaic law, by prophecy, by gospel, and by centuries of Christian philanthropy. But business and industrial ethics belong in their domain also. The change of emphasis from a purely personal religion to one which claims jurisdiction over the whole life of man is a return to an ancient and sound conception of the function of religion, as well as a necessary development of the newer understanding of human behavior.

A third method of fact-finding for which there may be legitimate occasion is represented by the recent inquiry undertaken by the Interstate Commerce Committee of the Senate. Either house of Congress, through a special committee or one of its standing committees, may perform a public service by an inquisition which will expose evils and lighten up controversies in a way that is not within the power of any unofficial body. State legislatures may in some situations perform a similar service. Such uncovering of corruption in the government itself and of such scandalous relations between political parties and private interests as have been disclosed by the investiga-

tion of the Public Lands Committee into the oil industry, is not only legitimate but of incalculably far-reaching importance. In that instance further justification for the investigation lay in the fact that the policy of naval oil reserves was involved. While no such overwhelming reasons are to be found in any notorious facts for a congressional or legislative inquiry into the coal industry, at the same time the long-standing division between union and non-union territory, the bitterness of the industrial conflict, and the failure of the coal industry to function continuously in such a way as to insure the nation's fuel supply on the one hand and a reasonable degree of prosperity to the coal industry on the other, give sufficient warrant for legislative inquiry.

It has been a good thing for the senators to visit the scene of the protracted strike. It has done no harm to give operators and representatives of the miners an opportunity to air their views at a public hearing with the resulting newspaper publicity. We are rather more likely to secure the necessary legislation for official fact-finding and the adjustment of industrial difficulties because such hearings have been held. Even if we are skeptical on general principles as to the results of fishing expeditions by legislative committees, we may, nevertheless, recognize that such inquiries may and often do bring something to the surface, even though it may not be the particular aquatic game for which the hook was baited.

These four methods of fact-finding then — (1) by the individual in his own interest; (2) by the public press in public interest; (3) by some disinterested body like the Federal Council in the interest of the social conscience; and (4) legislative inquiry as a basis for remedial legislation — are all legitimate and in connection with the coal industry have ample justification. All together, however, they are not enough. What is needed more than any of these, except the first, is authoritative, disinterested, and continuous fact-finding by the Federal Government through an official agency created for that purpose. This was the conclusion of the fact-finding commission of 1922-23, and so far as governmental action is concerned was the most important of the recommendations of that commission. The need for such fact-finding would remain if the mines were nationalized, but it is equally urgent if the

mines remain under private control and management. No sporadic inquiry by press or church or legislative body can take the place of it.

Through the Bureau of Mines the Government already collects facts in regard to production and sales realization, but the facts in regard to costs and margins, investments and profits, wage rates, and annual earnings, are all likewise essential. The purpose of collecting and disseminating them at stated intervals is not to embarrass but to aid the industry and the consumers of its output. Whether it would be appropriate to make known the facts in regard to a particular corporation engaged in the coal industry, as is now regularly done in the case of railroad corporations, may be a question. Fact-finding and publicity do not necessarily involve this. Facts could be grouped as they are by the Census and the Internal Revenue Bureau in such a way as to avoid making known the costs of any particular operator or buyer, if that is preferred, although personally I would favor following the precedent of the practice in regard to the railroads and accepting literally the principle recognized by the Coal Commission that the time has come when there no longer need be or should be any secrets in the coal industry.

I see no likelihood of any substantial change for the better in the distracted and debilitated coal industry until the recommendations of the Fact-Finding Coal Commission in regard to permanent, continuous, official fact-finding are put into effect.

INDUSTRIAL FACT-FINDING AS A FUNCTION OF GOVERNMENT

RICHARD H. LANSBURGH
Professor of Industry, University of Pennsylvania

ONE of the most interesting commercial phenomena at the present time is the plea business has been making that government shall not interfere with or guide its operations, while, at the same time, in almost every crisis it demands that government shall give aid. In effect, this means that government is expected to do for business what it cannot do for itself in times of stress, but it shall know nothing about business as a basis for such action. However, a large section of the industrial community has shown no desire, in recent years, to have the government interest itself in one type of industrial problem, and one of the most important, namely employer-employee relations. Although there have been sporadic attempts to foster good employer-employee relations in this country through governmental bodies, such as the Railroad Labor Board, nevertheless such instances have not had the support of both parties within the industry. Union labor has time and again demanded governmental action, but it has not favored governmental arbitration in all cases, and it has feared the effect of data prepared by governmental fact-finding commissions, which, it has respected, have had only some of the facts, or have been prejudiced against it.

The so-called "American" plan of employer-employee relations which has been advanced by certain employing interests in recent years, including as it does the open shop and the entire right of the employer to deal with his workers as he sees fit, in no way provides for industrial fact-finding as a function of government. When the demand arises in Congress, as it did recently, for a survey of an important current industrial condition, unemployment, this same group endeavors to sway the agency making the investigation by news releases without end tending to show that in the industries which they represent the unemployment is only slightly above normal.

The employing group at large has never accepted the result of any investigation made by a government fact-finding body in this country if it did not favor their interests.

Thus, while government assistance in business problems is desired in most instances by business, this does not hold true for assistance in solving labor problems, either by the development of facts or by mediation or arbitration. Such a condition has prevented governmental agencies from asking for grants of power for fact-finding, and, indeed has resulted in failure to utilize grants of power already enjoyed. Thus, although the Interstate Commerce Commission has full power to require the railroads to report conditions of employment, such as wages, in such ways that they will be useful in wage-determination they have maintained their reports in such form that they cannot be used with confidence in time of negotiations. If there were a greater disposition on the part of the railroad companies to present wage statistics in a form that would make them available under such conditions, that is, as the basis of fact-finding, governmental or within the industry, doubtless the reporting forms of the Interstate Commerce Commission would have been changed before this.

When a fact-finding commission, such as the United States Coal Commission, has sought information within an industry, it has been impeded in numerous petty ways, particularly in attempts to secure information from company books. This Commission's work was probably the greatest single attempt at fact-finding in any of our basic industries; yet, whatever the cause, its findings have affected the operation of the industry but little, either in time of industrial warfare or in time of industrial peace. It is significant that the present lamentable conditions in the soft coal industry have followed so closely the work of this Commission. Our businesses pay but passing attention to fact-finding reports of governmental agencies in matters affecting labor relations.

During the last anthracite coal strike, Gifford Pinchot, Governor of Pennsylvania, found difficulty in having the anthracite coal operators meet with him in a mediation attempt, because he had settled a previous controversy along lines dictated by the fact-finding of the United States Coal Commission and by agencies of the Commonwealth of Pennsylvania.

Industrial strength, rather than industrial facts, has been used as the basis of wage-relations in this industry for many years.

These conditions, and the fact that business itself so often demands aid from governmental bodies, bring forward the question as to the function of government in an economic age such as the present. If facts collected by governmental authority are not recognized in disputes which effect whole sections of our country because the facts are not considered accurate, though they have been collected largely from the side which questions them, it is improbable that the government will be able to serve that industrial section with any degree of helpfulness. We have heard that government should be the servant and not the master, but if governmental fact-finding in labor disputes be spurned by those affected, governmental action will be in connection with police power only, which will serve not to adjust the industrial situation, but to intensify it. When exercising its police power a government is most certainly the master.

Facts in industry are becoming more complicated every day. With the development of mechanization in industry, and with the competition that exists under the present buyers' market, facts which can be used as the basis of a wage-settlement are so complicated as to be outside the reach of individual workers or workers' organizations other than the largest and the strongest financially. Trade associations and employers' associations have cost information from their individual members that would serve as the basis of settlement of many wage disputes, and yet these facts are not even given to arbitrators who are called in in times of industrial strife. Relative strength of bargaining power on either side may ruin a community while the facts that would go far to solve the issues are locked up in the safe. If government is not going to take those facts out of the safe, who is? The individual employer is not, the trade association is not, the employees cannot. Huge government departments, with payrolls amounting to many hundreds of thousands of dollars annually, struggle "to promote better understanding between employer and employee", but the facts that would allow them to promote such understanding are locked from them. It is no wonder that their payrolls become the plaything of the politician, to be used in furthering his

own local political interests. For, in exercising the authority which is given them, these governmental agencies dare not deal with facts, for facts might offend some large interests with votes, and votes mean the political life not only of the head of the agency but of the agency itself, and hence the continuation of the payroll.

There are millions of the people's dollars wasted every year on activities that can reach no good end unless basic industrial facts are known, and there are few attempts to reach the facts. And if fact-finding were attempted, the next legislature or Congress would find many members desirous of cutting off the funds of that particular governmental agency. This condition cannot be changed until the attitude of large sections of the people towards governmental fact-finding is changed. Fundamentally, this attitude cannot be changed until the appointees and committees and commissions appointed to find the facts have training which will enable them to know fact from opinion, and will have sufficient personal strength to demand that the facts, as found, be utilized rather than scorned.

Let us pause to observe some of the facts of industry that effective governmental fact-finding might bring to public knowledge:

(1) The causes of the present unemployment situation and the remedies. If mechanization of industry is a major cause of unemployment and hence of a decrease of the community's purchasing power, some neutral agency outside of industry must study the economic conditions of the country and suggest a remedy. That is a natural governmental function. It is apparent that wage decreases and lengthening of hours of work will not ameliorate the present situation but rather aggravate it. Yet such programs are being undertaken by many employers in this country. Suppose that maintenance of wage levels with two shifts to utilize better the production machinery of today is what is needed. I personally feel that would be a bold approach to a solution of the unemployment problem caused by mechanization. Only unbiassed investigation could show whether such steps were in fact desirable. University research departments, research foundations and the government provide the only means of such investigation. The findings of the first two types of bodies will not receive

general publicity nor will they enjoy general confidence for many years. Governmental fact-finding might point the way out of the present situation.

(2) The United States Bureau of Labor Statistics has pointed the way in fact-finding on questions of wages, hours, cost of living, and safety. Its researches are utilized to a tremendous degree. Yet there is no machinery established whereby this bureau could bring employers and employees together and lay the facts before them. The Division of Simplified Practice of the United States Department of Commerce under the leadership of Mr. Hoover and Mr. Ray M. Hudson has shown the way in bringing conflicting trade groups together around the conference table to consider the facts that provide the necessary basis for any sound attempt to deal with conditions detrimental to the industry. As indicated, it is easier to accomplish this in such a case than in labor questions, but still it remains true that governmental fact-finding before trouble starts can be an important aid in labor questions. The same technique as in simplification would not work, but a similar technique might.

(3) State departments of labor in industrial states are in constant touch with labor conditions within their states. They are already collecting employment, wage and, in some cases, turnover data. They have mediation services which act in industrial disputes after they occur. In some states, such as Pennsylvania, this service has acted upon information that disputes might occur, and frequently, in such cases, it has been found that better understanding of conditions between employer and employee would serve to eliminate the threatened difficulty. Such services should be greatly enlarged and to their staffs should be added experts in industrial fact-finding. These may serve the mediators by placing them in an excellent position compared to employer and employee with relation to knowledge of facts in a given industry. In some states there is already a close connection between the group collecting wage and employment data and the mediators. Such close connection is very desirable and should be established in state departments in which it is now lacking.

(4) Since government, and government only, is able to develop a fact-finding service that will be of value to the

country at large, it is essential that this fact be recognized by officers in charge of governmental departments and bureaus which might undertake such service. Too many times in the past such officials have apologized to industry for what they themselves termed their "interference". It will be necessary to change industry's viewpoint and that will never be done by apologies for the governmental unit involved. However, in order that no apologies may be necessary, the character of personnel in all governmental fact-finding groups must reach the standard set today by those which are not involved in partisan politics. To bring such politics into industrial disputes ends the value of the so-called fact-finding group.

In conclusion it is evident that industry is opposed today to governmental fact-finding in labor disputes and that this circumstance has hampered any steps that have been taken in the past. However, it is also evident not only that fact-finding is a governmental function, but that the government is the only possible agency for effective, neutral fact-finding in industry. Furthermore, it is probable that if a governmental group believes in itself as a fact-finding agency, it will have a fair chance of success.

NOTE. In the discussion which followed Professor Lansburgh's address, Mr. ROBERTS said: "I cannot help remarking that in my opinion the attitude of industry is not quite so bad as Professor Lansburgh has said. While everything he has said may be true, certainly there is a tendency among employers and industry in general to favor fact-finding much more than in the past. For instance, in the case of the Coal Commission, on which Dr. Devine served, I happen to know that the Bituminous Committee, acting on the advice of their counsel, opened up all their books. Again, in the recent investigation of the General Electric Company by the Federal Trade Commission, the General Electric Company opened up its books. In the present investigation of the public utility industry by the Federal Trade Commission, I know that counsel have advised, and I believe that the industry will adopt, the policy of not making any technical objections to the investigation. I simply cite these as a few elements of hope in the situation. Of course I agree entirely with Professor Lansburgh's conclusion that we ought to have more impartial governmental fact-finding in industry."

WHAT HAS BEEN DONE BY BRITISH FACT-FINDING BODIES IN INDUSTRIAL RELATIONS

JOHN H. RICHARDSON
Economist, Graduate of Cambridge University, England; Visiting Professor of Social Legislation, Columbia University

RECOGNITION of the contribution which fact-finding can make to improvement of British industrial relations is a recent development. In pre-war days negotiations for the establishment of wages, hours, and other conditions of labor in the leading industries were mainly trials of strength between the employers' and workers' organizations. The facts of the situation were rarely available. Some improvement has been effected in recent years, the protracted post-war depression having convinced both employers and workers of their common interest in the avoiding of disputes. This has resulted in a tendency to replace conflict by cooperation based on joint investigation of the facts, but so far in many industries only the fringe of the problem of fact-finding has been touched.

The need for more complete and systematic information regarding the state of industry is widely expressed by those interested in securing the peaceful settlement of industrial disputes. They recognize that ignorance of the facts frequently leads to exaggerated demands by both sides. On the other hand, adequate knowledge of the situation often proves that the margin in dispute is so narrow as not to be worth a fight.

The case for compiling and publishing the facts is strongly presented in a report prepared in 1926 by an unofficial committee consisting of prominent employers, trade union leaders, economists and statisticians.[1] They were agreed that:

> . . . there is no more vital problem for the nation than that of assuaging industrial unrest. Among many causes of our difficulties a leading one is dissatisfaction with the sharing of the product of industry and the feeling that the worker sometimes does not get a fair deal, and at

[1] *The Facts of Industry: The Case for Publicity*, published by Macmillan and Company, London. A number of the examples given in the present paper are taken from this report.

> others, owing to lack of knowledge, demands impossibilities. This suspicion can only be allayed by the fullest information, by which we mean not merely facts produced in time of emergency, but a regular watch upon the progress of production and the distribution of the proceeds. We are not optimistic enough to think that the disclosing of information alone will create industrial peace, but we are satisfied that industrial peace cannot be attained without it.

The report of the committee in addition to arguing the importance of publicity gives a survey of the statistics available and makes specific recommendations for their improvement into an effective instrument for industrial peace. The importance of publicity of the facts about industry is also stressed and definite proposals are made in the Report of the recent Liberal Industrial Inquiry.[1]

Before proceeding to an account of the extent to which fact-finding has been developed in Great Britain a brief description is given of the machinery by which industrial relations are regulated. It is only on the basis of a knowledge of the machinery in operation that the value of the statistics available for industrial negotiations can be appreciated.

THE MACHINERY OF INDUSTRIAL RELATIONS[2]

Collective Bargaining. The predominant method by which labor conditions are regulated in all the chief industries is collective bargaining between organizations of employers and of workers. The importance of this method is indicated in part by the fact that, at the present time, the number of trade unionists is about 5,500,000 or approximately one-third of the total number of industrial wage-earners. The employers are equally well organized. It should be borne in mind, also, that the effective field of application of agreements extends considerably beyond the membership of the signatory parties.

Conciliation and Arbitration. Collective bargaining is supplemented by conciliation and arbitration systems set up either by agreement between the organizations of employers and workers themselves, or by legislation. The industries in which

[1] *Britain's Industrial Future, being the Report of the Liberal Industrial Inquiry* (London, 1928), pp. 85-9, 121-5 and 218-9.

[2] A detailed account of British methods of industrial negotiation is given in the *Survey of Industrial Relations* by the Committee on Industry and Trade (London, 1926).

systems of conciliation or arbitration or both have been set up by agreement include the iron and steel trades, coal mining, engineering, shipbuilding, the cotton trade, the boot and shoe trade and railway transportation.

The system of conciliation and arbitration established by legislation is based entirely on the voluntary principle, there being little demand in Great Britain for compulsory measures. It is mainly embodied in the Industrial Courts Act, 1919.[1] This act provides that, with the consent of parties to a dispute, the Minister of Labor may take such steps as he considers expedient to settle the dispute by conciliation. Where these steps are not effective the Minister may, with the consent of the parties, refer the matters under dispute to the Industrial Court, which is a permanent court of arbitration. If the parties prefer, the dispute may be referred to a single arbitrator or to a Board of Arbitration specially constituted for the purpose. The Industrial Courts Act also gives the Minister of Labor power, especially in cases of dispute in which the interests of the public are involved, to set up Courts of Inquiry, with or without the consent of the parties. These Courts have no power of arbitration; their task is to endeavor to secure relevant data so that the issue may be narrowed and the public provided with an impartial statement of the facts. In practice this system of voluntary conciliation and arbitration has been frequently called into operation; the Industrial Court alone has dealt with over 1000 cases, and its decisions have been almost invariably accepted.

Joint Industrial Councils. Collective bargaining is also supplemented by a second system, namely that of Whitleyism or Joint Industrial Councils. The purpose of this system is to provide means for insuring that the conditions of industry shall be systematically reviewed by those concerned. It represents an attempt to extend the principle of industrial democracy. Instead of occasional conferences for collective bargaining, the scheme is to provide machinery for regular meetings of employers and workers for constructive discussion and cooperation based on mutual recognition of common in-

[1] In addition to the system established by this Act, officers of the Ministry of Labor in the chief industrial centers endeavor to settle disputes by conciliation.

terest in the prosperity of industry. It affords opportunity for the study of problems such as improvements of processes and productive organization, industrial research and the elimination of waste, which are not normally considered in collective bargaining. The councils consist of representatives in equal number of employers' organizations and of trade unions. The system was introduced with enthusiasm immediately after the war with the support and stimulus of the Government, and, although it has suffered a decline more recently, it has made and continues to make an important contribution to the maintenance of good relations in a number of organized industries. At the present time there are nearly fifty Joint Industrial Councils covering industries which employ a total of over three million workers. These national councils are supplemented to some extent by District Committees and Works Committees.

Trade Boards. The systems of collective bargaining, conciliation and arbitration and Joint Industrial Councils outlined above are applicable almost solely in industries in which organizations of employers and workers are well established. There are, however, a number of branches of industry in which no adequate machinery exists for the effective regulation of wages. If in any such branch the rates of wages are exceptionally low the Minister of Labor, in accordance with the provisions of the Trade Boards Acts of 1909 and 1918, may set up a Trade Board for the purpose of fixing minimum wage rates. A Trade Board consists of members representing employers and an equal number of members representing workers, with the addition of impartial members (in practice three). At the present time Trade Boards are established in some forty branches of industry employing about 1¼ million workers.[1]

All the various bodies for industrial relations described above are concerned with the facts of industry. The extent to which they compile the facts is now indicated. An account is also given of more general industrial fact-finding undertaken by certain government departments and other public and private bodies.

[1] A system of regulating the minimum wages of agricultural workers in England and Wales by means of County Committees and a Central Board is in operation in accordance with the provisions of the Agricultural Wages (Regulation) Act, 1924.

FACT-FINDING BY EMPLOYERS' AND WORKERS' ORGANIZATIONS IN ORDINARY COLLECTIVE BARGAINING

To an increasing extent both employers' and workers' organizations submit data in collective bargaining. The data compiled are, however, subject to certain defects. They are usually prepared for the purpose of supporting a particular case rather than to give a systematic and impartial review of the actual position of the industry. Consequently they are attacked by the opposite side and tend to generate a distrust of statistics. They are compiled only at irregular intervals and do not give a continuous review of conditions. These defects have been remedied in certain industries by the establishment of machinery for more frequent meetings or by agreements to set up committees of enquiry on which both employers and workers are equally represented. Also the sliding-scale system of wage adjustment which has been widely adopted involves a regular review of the facts on which the scales are based.

The engineering industry provides an illustration of fact-finding by one side in particular collective negotiations. In 1924 the employers presented a detailed statement for about 1000 firms showing total turnover and cost of production including costs of materials, wages, general and administrative charges. The statement was designed to show the smallness of the balance available to meet capital and certain other charges. In negotiations on the railways, data have been submitted by the companies showing changes in receipts and dividends in relation to changes in wages.

Facts Compiled by Joint Committees. Of more value in improving industrial relations are the cases where committees of employers and workers have been set up jointly to investigate the facts. An interesting example of such a committee is that set up in 1925 to consider the position of the shipbuilding industry. Both employers and workers were desirous of cooperating to assist in the recovery of the industry and especially to enable British firms to compete more effectively with German and Dutch companies. Detailed investigations were conducted. An Interim Report, dealing with costs within the control of the industry, was published in October, 1925, and a Final Report, dealing with costs outside the control of the

industry, was published in July, 1926. In the sugar-refining industry at Greenock a dispute in 1924 due to refusal to grant a wage increase was settled as a result of an investigation, agreed upon by both employers and workers, into the financial condition of the industry. The facts, compiled by a firm of chartered accountants, led to the withdrawal of the workers' demands. Another illustration is the Court of Investigation set up by representatives of employers and workers engaged in the Scottish shale oil industry as the result of an agreement of December, 1925, to consider certain matters in dispute. A survey was made of wages, selling prices of the oil products and profits. The facts obtained made an effective contribution to the settlement of the dispute.

Facts Used in Sliding Scale Agreements. The application of the sliding-scale principle has made a notable contribution to the improving of industrial relations. According to this principle the wage scale, instead of being fixed for the whole period of validity of an agreement, is variable in accordance with changes in some specified criterion. The system is applied in a number of important industries in Great Britain, including the chief branches of the iron and steel industry, coal mining, the wool and certain other branches of the textile industry, the boot and shoe trades, transportation, public utility undertakings and the civil service. Although the system makes little contribution to the problem of what basic wages shall be fixed, it is of value in securing the regular adaptation of those wages to changing conditions without the necessity of reconsidering the whole problem at frequent intervals. In this way the period of validity of agreements is prolonged and the possibility of disputes diminished.

The sliding-scale system involves agreement as to the precise facts in relation to which the basic scale shall be adjusted and the methods by which these facts shall be compiled. The most appropriate facts vary from industry to industry. Three main criteria have been adopted in sliding-scale agreements, namely changes in selling price of the product, changes in the proceeds of the industry and changes in the cost of living.

Sliding-scale arrangements based on the selling price of the product have been in operation for many years in the most important branches of the iron and steel industry. They have

greatly facilitated the maintenance of industrial peace, no serious stoppage having occurred since the system was introduced. In the various branches typical products, e. g. pig iron, or steel bars and steel rails, are selected. The average selling price during three months or other specified period is calculated, the data being taken from the books of the various companies by accountants jointly employed by the employers' and workers' organizations. Wage rates during the succeeding period are determined automatically by this average selling price in accordance with the agreed scale of adjustment.

In the coal-mining industry various post-war agreements provide for the regular adjustment of wage rates in accordance with the proceeds of the industry. These agreements, which cover the whole of the industry, have resulted in the compilation and publication of much valuable information required to determine what the proceeds have been during each period of three months, together with supplementary statistics. The data are compiled in each coal-mining district by accountants appointed by Joint Boards on which employers and workers are equally represented. The information is supplied to these accountants by the employers and is checked by test audits. The statistics include quantity of coal produced, costs of production, proceeds from the sale of coal disposable commercially, number of workpeople employed, number of man-shifts worked, average earnings per man-shift worked, and the number of man-shifts lost which could have been worked (including absences due to sickness or accident). These data are available in a continuously comparable series since 1924 and, with certain modifications, since 1921. They cover practically the whole industry and give a detailed review of its position.

The cost-of-living sliding-scale system was widely adopted during the war and in the early post-war years when prices were changing rapidly. With the relative stability of prices in recent years the system has declined somewhat in importance. However, agreements providing that basic wage rates shall be varied from time to time during the validity of the agreements in relation to changes in the cost of living are in operation for about 2½ million workers.[1] In these cases the

[1] The cost-of-living sliding-scale system applies to some of these workers in accordance with Joint Industrial Council agreements or Trade Board determinations.

facts regarding changes in the cost of living are not compiled by the employers and workers; they have adopted instead the cost of living index published each month by the Ministry of Labor.

FACT-FINDING BY VOLUNTARY CONCILIATION AND ARBITRATION MACHINERY

The systems of voluntary conciliation and arbitration established either by agreement between employers' and workers' organizations or by the Industrial Courts Act, 1919, have made important contributions to the peaceful settlement of disputes. The decisions are based on an examination of all the facts forthcoming, and frequently data are secured which otherwise would not be taken into consideration. Thus in a number of cases arbitrators have been given access to the employers' accounts. The Courts of Inquiry under the Act of 1919 have no power to compel the parties concerned to give information, but their requests for evidence have rarely, if ever, been refused. The Industrial Court, dealing with disputes in different industries in all parts of the country, secures much information of a general character. In a particular dispute it is therefore able to base its awards on a wide knowledge of conditions in other trades.

Conciliation and arbitration systems, however, investigate the facts only as a last resort when disputes have become acute. They do not undertake those regular and systematic compilations which are essential if mutual confidence and fair dealing in ordinary negotiations between employers' and workers' organizations are to be developed.

FACT-FINDING BY JOINT INDUSTRIAL COUNCILS

As fact-finding bodies Joint Industrial Councils are more satisfactory than occasional conferences of employers and workers for the purposes of collective bargaining, or than conciliation and arbitration systems. They meet regularly and are established for the purpose of increasing goodwill and mutual understanding. The "model" plan on which most Joint Industrial Councils have been constituted includes among the functions appropriate for these bodies "the collection of statistics and information on matters appertaining to the industry". About three-quarters of the Councils now in operation have incorporated a provision of this character in their constitutions.

In practice only a few Councils appear to be compiling statistics regularly which show in detail the output, costs, profits, capitalization and state of employment for the industry as a whole or for a representative part of the industry. Such data, with detailed subdivisions, have been published in the annual reports of the Joint Industrial Council for the Iron and Steel Wire Manufacturing Industry. The Joint Industrial Council for the Pottery Manufacturing Industry has set up a Statistical and Enquiry Committee which compiles information regarding wages, prices, profits and other relevant data. A significant step was taken in this industry during wage negotiations in 1924 when a firm of chartered accountants was employed to make a detailed inquiry into earnings, selling prices and profits throughout the industry. The facts brought to light by this inquiry were recognized to be of the greatest value in providing the basis for a peaceful settlement, and the desire was expressed that similar information should be compiled at regular intervals for use in wage adjustment.

In several other industries, e. g. match and glove manufacturing, statistics are regularly compiled which give the Joint Industrial Councils information as to the state of trade. The data compiled include statistics of production, imports and exports, and employment. In certain industries which do not compile statistics regularly, facts regarding their financial condition have been furnished during wage negotiations. The supply of this information appears frequently to have facilitated the reaching of a satisfactory settlement. In some cases the facts have been compiled by firms of chartered accountants; this method ensures impartiality and, at the same time, avoids the disclosure to interested persons of the position of the individual firms.

FACT-FINDING BY TRADE BOARDS

Trade Boards, like Joint Industrial Councils, have certain advantages as fact-finding bodies over ordinary conferences for collective bargaining and over conciliation and arbitration systems. They are regularly constituted. They cover the whole branch of the industry in which they have been set up and, in conducting inquiries, can obtain assistance from the Ministry of Labor with its Trade Boards Inspectorate. Hitherto, however, the boards, when considering what mini-

mum rates of wages to fix, have not generally undertaken systematic inquiries into the facts. As in collective bargaining, the employers when faced with a demand for an increase in rates argue that the rates proposed by the workers are beyond the capacity of industry to pay and often refer to the severity of foreign competition. The workers endeavor to base their claims on the cost of living and denounce the existing rates as starvation wages. But the facts presented in support of the various claims are mainly based on general evidence only.

A number of boards have adopted the sliding-scale system by which the minimum rates are adjusted periodically in accordance with changes in the cost-of-living index compiled by the Ministry of Labor. Occasionally individual employers have submitted to the impartial members of boards statements regarding the financial situation of their businesses. In a few cases boards have requested information as to existing rates of wages or the economic conditions of the industry before deciding what minimum rates to fix. Certain investigations have been conducted into the effects of the minimum rates fixed, and into the earnings which minimum piece rates provide.[1] The results of these investigations have facilitated the work of the various boards, thus indicating the desirability of further developments along similar lines.

FACT-FINDING BY GOVERNMENT DEPARTMENTS OR IN COMPLIANCE WITH CERTAIN STATUTORY REQUIREMENTS

Many of the facts compiled and published by various government departments throw light on the state of industry and are frequently used by employers and workers during collective negotiations.[2] Certain figures of interest in industrial relations are compiled to meet statutory requirements. Reference is made here only to some of the more important data available.

The Ministry of Labor. Mention has already been made of the extensive use in sliding-scale agreements of the cost-of-living figures published monthly by the Ministry of Labor in

[1] D. Sells, *The British Trade Boards System* (London, 1924), pp. 20, 25.

[2] A complete statement of the current statistics published by British government departments is given in the *Guide to Current Official Statistics of the United Kingdom* (London, 1926).

its *Labour Gazette*. These figures are also widely quoted during wage negotiations apart altogether from the sliding-scale system. The Ministry publishes each month comprehensive statistics of unemployment compiled in connection with the application of the Unemployment Insurance Acts. They cover over twelve million workpeople in practically every industry except agriculture and domestic service. Separate data are given for each industry and branch and for males and females, showing the numbers wholly unemployed and the numbers involved in temporary stoppages. These figures of unemployment are supplemented by statistics of employment in representative undertakings in some of the principal industries. The Ministry publishes the rates of wages and hours of labor according to the provisions of all the chief collective agreements. Statistics are given annually of the results of profit-sharing and labor copartnership schemes. In the early post-war years the Ministry published surveys of the chief facts regarding labor conditions in other countries. In more recent years it has relied largely on the International Labor Office of the League of Nations to compile this information. Special inquiries are sometimes undertaken into labor conditions abroad, e. g. the study of industrial conditions and industrial relations in Canada and the United States by a delegation which visited these countries in 1926.

The Board of Trade. This department publishes statistics of foreign trade, showing the quantity and value of imports, exports and re-exports. In view of the important part which foreign trade plays in Britain's economic life, these data give valuable indications of the position of industry and are frequently used in industrial negotiations. The Board compiles statistics of wholesale prices and publishes indexes showing changes in the general level of wholesale prices. It also publishes reports giving comprehensive information on the mining industry.

The Board conducts the Census of Production. The intention is to hold a census every five years but so far censuses have been undertaken only in 1907, 1912 (not completed owing to the War) and 1924. The supply of the information is compulsory under the Census of Production Acts. The data provide a valuable review of the industrial development of the

country. In the 1924 census, the statistics for each industrial branch included the selling value of gross output, the cost of materials used, net output, number of persons employed, value of output per person employed, the quantity of mechanical power used and the proportion of total mechanical power which was in reserve or idle during the year. These data were supplemented by an inquiry into earnings and hours conducted by the Ministry of Labor. In this case resort to compulsory powers was not made. A large number of returns were, however, received. The data compiled show for the various branches of industry the average weekly earnings of all workpeople covered by the returns, normal hours of labor per week, the hours actually worked, average hourly earnings and the extent of short time. Separate figures are given for male and female workers.

Other Departments. The Ministry of Transport publishes annual statements showing the financial position of the railway companies. Other data are also given including the number of passenger journeys, freight conveyed, total net ton-miles, freight train-miles run and receipts from passenger and freight traffic. This information is supplemented by an annual statement regarding the number of persons employed in the railway service and the average weekly wage rates and average weekly earnings of the chief categories of workpeople.

Of an entirely different character are the investigations of the Industrial Fatigue Research Board, which is practically a government institution, set up in 1918 and supported almost entirely by public funds. The object of the Board is to promote better knowledge of the relations of hours of labor and other conditions of employment to the health of the workers and to industrial efficiency. It also endeavors to secure the cooperation of industries in applying the results of its researches. More than thirty investigations have been conducted. It is not necessary to stress the value of this kind of fact-finding on industrial relations.

Various Statutory Requirements. In accordance with Company Law, private and public companies are required to make certain financial statements. Private companies satisfy legal requirements by filing at Somerset House an annual statement

regarding capital. Joint stock and other public companies are required to supply annual statements in the form of balance sheets. The facts which these contain, and especially the dividends declared by various companies, are frequently quoted during industrial negotiations. But the balance sheets frequently fail to reveal the actual financial situation of the various companies. The stated value of assets may differ widely from the real value while hidden reserves, the issue of bonus shares and the "watering" of capital all add to the difficulty of determining what the real profits of a company have been.

More complete information is available regarding the financial position and working of tramways, gas, electricity and other public utility undertakings.

FACT-FINDING BY OTHER BODIES

A number of regular surveys are made for particular industries or for industry as a whole showing economic developments and the present position. These surveys, though not primarily made from the point of view of industrial relations, provide information of value in negotiations. One of the most important of these general compilations is that undertaken by the London and Cambridge Economic Service on the lines of the reviews of economic statistics published by the Harvard Economic Service and other organizations in the United States. The Federation of British Industries publishes each quarter a review of the chief facts of the business situation and makes tentative forecasts regarding probable conditions in the early future. An example of a review of economic conditions in a particular industry is that published quarterly by the British Electrical and Allied Manufacturers' Association in its *Trade Survey*.

In the compilation of information regarding the general facts of the business situation, Great Britain has made less progress than the United States. But it is becoming increasingly recognized that such information can make a valuable contribution, not only to the general economic development of the country, but also to the improvement of industrial relations. Ignorance of the facts by the community is an important cause of exaggerated inequalities of wealth and of wide fluctuations in business activity. These in turn generate

social unrest. It is largely with a view to the diminution of these evils that Mr. John Maynard Keynes, in *The End of Laissez-Faire,* advocates "the collection and dissemination on a great scale of data relating to the business situation, including the full publicity, by law if necessary, of all business facts which it is useful to know".

Reference may be made here to various *ad hoc* inquiries conducted from time to time into economic and labor conditions in particular industries and to general industrial surveys including the problems of industrial relations. Examples of the former type are the Royal Commissions appointed in 1919 and 1925 to inquire into the position of and conditions prevailing in the coal-mining industry. The latter type is represented by the investigations of the Committee on Industry and Trade appointed in 1924 to inquire into the conditions and prospects of British industry and commerce, with special reference to the export trade. Another example is the Liberal Industrial Inquiry which made a complete survey of the problems of British industrial relations.[1]

CONCLUSION

The above survey indicates that a considerable amount of valuable information is available for use in British industrial negotiations. It shows equally, however, that important developments are necessary in most industries, if fact-finding is to make its fullest contribution to the promotion of industrial peace.

The main lines of the developments required are indicated in the report of the committee to which reference has been made earlier in this paper.[2] The committee suggest that the Government, the employers and the trade unions should elaborate a scheme for the compilation and publication of relevant and essential facts. They recognize that such facts would vary from trade to trade, but recommend that information on the following points constitutes a necessary and practicable minimum of data which should be collected and published regularly for each industry:

[1] *Britain's Industrial Future,* especially pp. 143-242. Some of the main features of the *Report* are outlined in Mr. Rowntree's speech, *cf. infra,* p. 162.

[2] *The Facts of Industry: The Case for Publicity,* pp. 28-9. The Liberal Industrial Inquiry proposes a fact-finding program similar to that formulated in *The Facts of Industry.*

(a) *Total production,* estimated both in quantities and in money values (selling prices).
(b) *Cost of material.*
(c) *Cost of labor,* divided, where the conditions of the industry lend themselves to the distinction, into—
  (i) *Direct,* i. e., wages which can be booked to individual contracts,
  (ii) *Indirect,* i. e., wages which cannot be so booked.
(d) *General charges,* e.g., rents, rates and taxes (other than Income Tax), insurance, depreciation, general office expenses, maintenance and renewal of buildings and plant, and fixed salaries.
(e) *Balance* available for interest on loan capital, dividends and profits, and for allocation to reserve.
(f) *Number of wage-earners,* male and female, adult and juvenile, with indications sufficient to show their ages and the rates of wages paid.

These statistics could be compiled satisfactorily only by a permanent body or bodies in regular contact with each industry or group of industries. Neither occasional conferences of employers and workers for collective bargaining nor the existing conciliation and arbitration machinery would be suitable. The work could be undertaken in different industries by Joint Industrial Councils, Trade Boards, or joint committees set up by agreement between employers and workers. For a number of industries the compilations might be made more satisfactorily by a government department in collaboration with the employers and workers.

Agreement by those in control of industry to cooperate in such developments would represent a significant change from the present position, but is likely to be secured only gradually. The change would, however, do much to remove the feeling of suspicion and distrust, based on ignorance of the facts, which is so prolific a cause of industrial conflict. It would give the public a basis for sound judgment regarding the rival claims made by parties to a dispute. It would also provide employers with the information necessary for effective future planning and this would materially reduce the fluctuations of industrial activity which are responsible for much social unrest. Some development on these lines appears necessary if the peaceful and coordinated progress of British industry is to be assured.

PART II

INJUNCTIONS IN LABOR DISPUTES

THE SUPREME COURT'S CONTROL OVER THE ISSUE OF INJUNCTIONS IN LABOR DISPUTES

THOMAS REED POWELL
Professor of Law, Harvard Law School

THE purpose of this paper is to show the scope of the power of the Supreme Court of the United States to control the issue of injunctions in labor disputes and to point out how this power has thus far been exercised. The Supreme Court is composed of a Chief Justice and eight Associate Justices appointed for life by the President by and with the advice and consent of the Senate. The Constitution does not prescribe their qualifications. In addition to securing to them a life tenure except as they may be removed by impeachment for high crimes and misdemeanors, it safeguards them from reduction of their salaries and has been interpreted by the Supreme Court to save them from a state[1] or federal income tax[2] on their salaries. The position of Supreme Court Justices is thus a fairly secure one. Political proposals to secure popular revision of their decisions or to limit their power to find constitutional barriers to legislation have not met with approval from the electorate. The independence of the federal judiciary from popular pressure has not diminished with the passing of the years, although in most of our states there have been successful efforts to make the wielders of

[1] The exemption of federal judges from state income taxes is included within the general canon that neither the states nor the United States may tax instrumentalities of the other.

[2] *Evans v. Gore* (1920), 253 U. S. 245, 40 Sup. Ct. 550, held over the dissent of Justices Holmes and Brandeis that the enforced inclusion of a judicial salary in the gross income reported in assessing a general federal tax on net income is a reduction of the compensation designated by statute prior to the enactment of the federal income tax law. *Miles v. Graham* (1925), 268 U. S. 501, 45 Sup. Ct. 601, holds that an income tax law in force at the time when the judicial compensation is fixed is, if applied to that compensation, a reduction thereof within the prohibition of the Constitution.

judicial power accountable from time to time to the judgment of the electorate.

For the selection of Supreme Court Justices there are no established extra-legal conventions. In many of the states the bar associations exercise an appreciable influence in advising upon nominations and elections or appointments. In some states the courts wield some indirect power to advise. Appointments to federal district courts owe not a little to political recommendations and to that extra-constitutional convention called senatorial courtesy. Doubtless a President will listen to political suggestions in naming a Supreme Court Justice but his choice is pretty much unfettered. This is not the place to tell the story of the appointment of various members of the Supreme Court. It is enough for our present purpose to point out that, viewed in the large, the selection is pretty much a matter of chance.

This introduction would be irrelevant if judges were intellectual automatons in interpreting statutes and constitutions and in deciding issues at common law. It is not irrelevant if judges have a choice how to decide. If such a choice is possible, it makes a difference who does the choosing. It makes a difference whether their choice is practically final. When judges decide issues of common law or of statutory interpretation, legislatures may pass new statutes to substitute new rules for the future. These statutes, however, are subject to the test of constitutionality. If the Justices of the Supreme Court declare unconstitutional a statute of Congress or of a state legislature, it takes a judicial recantation or a constitutional amendment to put into law what the Court has decreed is not law. State constitutional amendments are in many states comparatively easy to secure if there is any strong popular demand for them. In spite of amazement that in one instance at least the federal Constitution has been amended too expeditiously, it still remains true that a Supreme Court decision is not likely to be rendered prospectively impotent by a constitutional amendment. We have reversed the Supreme Court on decisions or declarations that a citizen may sue a state in the federal courts,[3] that Congress may not abolish slavery

[3] Amendments to the Federal Constitution, Article XI, recalling *Chisholm v. Georgia* (1793), 2 Dall. (U. S.) 1.

in the territories,[4] and that the United States may not levy an unapportioned income tax on income from property,[5] but we have left their other decisions unimpaired. Now and then the Supreme Court has overruled itself.[6] The time may come when the dissents in the cases to be here reviewed will muster a majority of a new Supreme Court and become the law of the land. Until that time arrives, the dissents are mere dissents and of no legal significance, no matter how great their appeal to other thinkers than those who wear the ermine.

Injunctions in labor disputes are not mentioned in the Constitution. Anything that the Supreme Court has to say about them is decided without guidance from the Constitution. From the Constitution comes the power to decide but not the choice of the decision. The wisdom of a decision is therefore open to intellectual debate though no outcome of the debate may alter the course of the law. Nothing in the training or selection of Supreme Court Justices gives them any esoteric wisdom beyond the appraisal of others. There are technical matters on which judges and lawyers may profess peculiar competence, but such technical matters do not dictate the permanent solution of issues of policy. It may take a technician to pierce technical incrustations enough to reach the issues of policy, but the issues of policy are usually there to be reached.

The story of the Supreme Court and labor injunctions begins with the famous Debs Case[7] decided in 1895 by a unanimous court. This sustained an injunction issued by the lower federal court against forcible interference with the interstate transportation of persons and property and the carriage of United States mails. The injunction was issued in response

[4] Amendments to the Federal Constitution, Article XIII, ending the effect of the declaration in *Dred Scott v. Sandford* (1857), 19 How. (U. S.) 393, that Congress may not prohibit slavery in the territories.

[5] Amendments to the Federal Constitution, Article XVI, allowing Congress to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, thus overcoming the decision in *Pollock v. Farmers' Loan & Trust Co.* (1895), 157 U. S. 429, 158 U. S. 601, 15 Sup. Ct. 673, 912, that a tax on income from property is a direct tax requiring apportionment.

[6] See the cases listed by Mr. Justice Brandeis in his dissenting opinion in *Di Santo v. Pennsylvania* (1927), 273 U. S. 34, 43, note 4, 47 Sup. Ct. 267.

[7] *In re Debs* (1895), 158 U. S. 564, 15 Sup. Ct. 900.

to a bill filed by the United States. The lower court had adduced the Sherman Law in support of the right of the United States to the injunction, but the Supreme Court rested the right on grounds independent of that statute. In the oratorical opinion of Mr. Justice Brewer there is ample language to warrant the inference that the injunction would have been sustained even though carriage of the mails had not been involved.[8] There is emphasis on the power and the duty of the United States to keep open the channels of interstate commerce and the competency of the United States to invoke the power of the civil courts to remove obstructions to that commerce. Thus without the aid of any state or federal statute specifically authorizing the issue of an injunction, the federal courts at the suit of the United States may enjoin some restraints of interstate commerce.

[8] The power of the United States to sue for interference with the carriage of the mails is thus expressed:

"Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill" (158 U. S., at page 583).

This narrower ground of the decision is followed by the broader ground when in the succeeding paragraph it is said:

"We do not care to place our decision on this ground alone. Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrong-doing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in court. . . . .

"It is obvious from these decisions that while it is not the province of the government to interfere in the mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties" (158 U. S., at pages 584, 586).

The next Supreme Court case on injunctions in labor disputes was *Gompers v. Buck's Stove & Range Co.*,[9] decided in 1911. An injunction against a boycott and blacklist had been issued by the Supreme Court of the District of Columbia at the suit of an injured private party. While interstate commerce was mentioned in the complaint, no relief was asked under the Sherman Law.[10] Apparently the District of Columbia court acted like a state court of general jurisdiction. All that came before the Supreme Court was the propriety of the punishment for contempt for violation of the injunction. The procedure had been one for a civil contempt and the punishment one of a criminal contempt. For this reason and

[9] (1911) 221 U. S. 418, 31 Sup. Ct. 492, noted in 73 *Cent. L. J.* 3. The decision below is discussed in 25 *Harv. L. Rev.* 375, 385, and 7 *Mich. L. Rev.* 499.

[10] Three years earlier in the famous Danbury Hatters Case—*Loewe v. Lawlor* (1908), 208 U. S. 274, 28 Sup. Ct. 301—the Supreme Court unanimously held a boycott of hats to be a violation of the Sherman Law when participated in by persons not themselves engaged in interstate commerce but for the purpose and with the result of restricting markets outside the state of manufacture and thereby restraining interstate trade. The case arose on demurrer to an action for damages brought by the employer against members of a labor union. This decision is discussed in Jerome C. Knowlton, "Labor Organizations in Legislation", 6 *Mich. L. Rev.* 609; and notes in 42 *Amer. L. Rev.* 315, 518; 8 *Colum. L. Rev.* 413; 21 *Harv. L. Rev.* 450; 56 *U. Pa. L. Rev.* 339; and 17 *Yale L. J.* 616.

For other discussions of legal issues relating to boycotts and injunctions against them, in periodicals published between 1900 and 1910, see James Wallace Bryan, "Injunctions Against Boycotts and Other Illegal Acts", 40 *Amer. L. Rev.* 196; Frederick H. Cooke, "Solidarity of Interests as Basis of Legality of Boycotting", 11 *Yale L. J.* 153; Charles R. Darling, "The Law of Strikes and Boycotts", 52 *Amer. L. Reg.* (*U. Pa. L. Rev.*) 73; Robert L. McWilliams, "Evolution of the Law Relating to Boycott", 41 *Amer. L. Rev.* 336; Theodor Negaarden, "The Danbury Hatters Case—Its Possible Effect on Labor Unions", 49 *Amer. L. Rev.* 417; Seymour D. Thompson, "Injunctions Against Boycotting", 34 *Amer. L. Rev.* 151; and notes in 4 *Mich. L. Rev.* 143 on the right of a union to declare and carry out a boycott; in 5 *Mich. L. Rev.* 389 on injunction against a boycott in aid of a sympathetic strike; in 15 *Harv. L. Rev.* 223 on the English case of *Quinn v. Leatham*; in 17 *Harv. L. Rev.* 139 on a case refusing an injunction against blacklisting. Boycotting and blacklisting are also considered in a number of the articles cited in note 11, *infra*.

The verdict of the jury in the Danbury Hatters Case was sustained in *Lawlor v. Loewe* (1915), 235 U. S. 522, 35 Sup. Ct. 170, commented on in 24 *Yale L. J.* 605. For proceedings for collection of the judgment, see *Savings Bank of Danbury v. Loewe* (1917), 242 U. S. 357, 37 Sup. Ct. 172, considered in 84 *Cent. L. J.* 173 and 30 *Harv. L. Rev.* 513.

also because the parties had settled their civil controversy, the fine and imprisonment were set aside. The case did not decide whether the injunction would have been sustained on appeal. The opinion remarked, however, that the injunction was not a violation of the constitutional guarantee of freedom of speech. Later proceedings for criminal contempt were set aside on the ground that the statute of limitations had run.[11]

In 1917 there came before the Supreme Court the question whether the Sherman Law authorized injured private persons to enjoin a boycott in restraint of interstate trade. By a vote of five to four it was held in *Paine Lumber Co. v. Neal*[12] that

[11] *Gompers v. United States* (1914), 233 U. S. 604, 34 Sup. Ct. 693. The suggestion that Mr. Gompers might be saved from imprisonment by pardon of the President is discussed in Richard W. Hale, "Injunctions and Pardons", 43 *Amer. L. Rev.* 192.

For articles published between 1900 and 1910, dealing with the law on various phases of labor controversies, see George W. Alger, "The Law and Industrial Inequality", 69 *Albany L. J.* 121; J. B. Ames, "How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor", 18 *Harv. L. Rev.* 411; James Wallace Bryan, "Injunctions Against Strikes", 40 *Amer. L. Rev.* 42; Francis M. Burdick, "Conspiracy as a Crime, and as a Tort", 7 *Colum. L. Rev.* 229; Charles R. Darling, "Recent American Decisions and English Legislation Affecting Labor Unions", 42 *Amer. L. Rev.* 200; A. V. Dicey, "The Combination Laws as Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century", 17 *Harv. L. Rev.* 511; P. L. Edwards, "Labor Strikes and Injunctions", 67 *Albany L. J.* 209; Ernst Freund, "Constitutional Limitations and Labor Legislation", 4 *Ill. L. Rev.* 609; G. G. Groat, "The Court's View of Injunctions in Labor Disputes", 23 *Pol. Sci. Quart.* 408; E. W. Huffcut, "Interference with Contracts and Business in New York", 18 *Harv. L. Rev.* 423; William Draper Lewis, "Some Leading English Cases on Trade and Labor Disputes", 51 *Amer. L. Reg.* (*U. Pa. L. Rev.*) 125; "The Modern American Cases Arising Out of Trade and Labor Disputes", 53 *Amer. L. Reg.* (*U. Pa. L. Rev.*) 465; "The Closed Market, the Union Shop, and the Common Law", 18 *Harv. L. Rev.* 444; "Should the Motive of the Defendant Affect the Question of His Liability? — The Answer of One Class of Trade and Labor Cases", 5 *Colum. L. Rev.* 107; W. A. Martin, "Union Labels", 42 *Amer. L. Rev.* 511; Edward F. McClennan, "Some of the Rights of Traders and Laborers", 16 *Harv. L. Rev.* 237; Thomas A. Sherwood, "An Inquiry into the Power of the State to Afford Relief in a Certain Exigency" (coal strike), 37 *Amer. L. Rev.* 545; Glenda Blake Slaymaker, "Labor Legislation; Its Scope and Tendency", 64 *Albany L. J.* 227; Jeremiah Smith, "Crucial Issues in Labor Litigation", 20 *Harv. L. Rev.* 253, 345, 429; D. Y. Thomas, "A Year of Bench Labor Law", 24 *Pol. Sci. Quart.* 80.

[12] (1917) 244 U. S. 459, 37 Sup. Ct. 718, discussed in 85 *Cent. L. J.* 113; 17 *Colum. L. Rev.* 707; 31 *Harv. L. Rev.* 312; 12 *Ill. L. Rev.* 435; 2 *Minn. L.*

it did not. Before this time, however, the Clayton Act of October 15, 1914, had authorized the issue of injunctions at the suit of private persons, subject to restrictions in cases between employers and employees. All the court seemed to assume that the particular case should be governed by the law in force at the time when it arose. Mr. Justice Holmes, who wrote the majority opinion, announced his personal view that the Clayton Act established a policy inconsistent with the grant of an injunction in the case at bar, but announced also that on this point he was in a minority. Here of course was an invitation to attorneys for employers to seek injunctions against boycotts in future cases under the Clayton Act. The minority opinion took the view that it did not require legislation to authorize the grant of an injunction when the court has jurisdiction and finds a wrong for which an injunction seems to it the appropriate remedy. It pointed out that federal jurisdiction had obtained on the two grounds of diversity of citizenship and an action arising under the Sherman Law. This minority view may have future significance because the minority attitude may now have become a majority attitude. If it has, it may be that the Supreme Court would now hold that Congress could not deny the remedy of injunction to the federal courts when the wrong is one which the Supreme Court thinks should be enjoined without the aid of any statute.[13]

Rev. 306; 2 *So. L. Q.* 333. The decision in the court below is treated in 27 *Harv. L. Rev.* 478, 497, but not on the issue whether an injunction may be had by a private party in a suit founded on the Sherman Law. The case was first argued in the Supreme Court on May 3 and 4, 1915. It was restored to the docket for reargument on June 12, 1916, was reargued on October 24 and 25, 1916, and decided on June 11, 1917.

The question whether a right of action for triple damages under the Sherman Law survives the dissolution of the plaintiff corporation is considered in 16 *Colum. L. Rev.* 231, 264.

[13] The following expressions in the minority opinion of Mr. Justice Pitney indicate the possibility that some judges might hold that it would be an unconstitutional invasion of the prerogatives of the federal judiciary for Congress to dictate restrictions on the exercise of jurisdiction conferred by statute:

"I dissent from the view that complainants cannot maintain a suit for an injunction, and I do so not because of any express provision in the act authorizing such a suit, but because, in the absence of some provision to the contrary, the right to relief by injunction, where irreparable injury is threatened through

In this same year 1917 the Supreme Court decided the famous Hitchman Case,[14] which it had had under consideration

a violation of property rights, and there is no adequate remedy at law, rests upon settled principles of equity that were recognized in the constitutional grant of jurisdiction to the courts of the United States" (244 U. S. 459, 473).

"By section 2 of article 3 of the Constitution, the judicial power is made to extend to 'all cases, in law and equity, arising under this Constitution, the laws of the United States', etc. This had the effect of adopting equitable remedies in all cases arising under the Constitution and laws of the United States where such remedies are appropriate. The federal courts, in exercising their jurisdiction, are not limited to the remedies existing in the courts of the respective states, but are to grant relief in equity according to the principles and practice of equity jurisdiction as established in England" (244 U. S. 459, 475-476).

For decisions that in some mysterious fashion the Constitution adopted some requirements of uniformity in the maritime law to be administered in the federal courts in the exercise of the admiralty jurisdiction and that Congress may not defeat this requirement of uniformity by allowing the application of state laws, see *Knickerbocker Ice Co. v. Stewart* (1920), 253 U. S. 149, 40 Sup. Ct. 438. It would be no greater judicial *tour de force* to find that legislative denial of right to relief in equity is an effort to narrow the scope of judicial power defined by the Constitution.

[14] *Hitchman Coal & Coke Co. v. Mitchell* (1917), 245 U. S. 229, 38 Sup. Ct. 65. This case is considered in Walter Wheeler Cook, "Privileges of Labor Unions in the Struggle for Life", 27 *Yale L. J.* 779; Thomas Reed Powell, "Collective Bargaining Before the Supreme Court", 33 *Pol. Sci. Quart.* 396; and notes in 6 *Calif. L. Rev.* 302; 86 *Cent. L. J.* 39; 18 *Colum. L. Rev.* 252; 3 *Cornell L. Q.* 317; 31 *Harv. L. Rev.* 648, 657; 16 *Mich. L. Rev.* 250; 27 *Yale L. J.* 578. The decision in the court below is discussed in 3 *Calif. L. Rev.* 78; 79 *Cent. L. J.* 199; 19 *Yale L. J.* 308. For consideration of somewhat related issues, see notes in 22 *Colum. L. Rev.* 78 on injunction against joining a union in violation of contract; in 26 *Harv. L. Rev.* 349 on common-law liability of a labor union for inducing breach of contract; in 12 *Minn. L. Rev.* 81 on injunction against persuasion to break a "yellow dog" contract; in 73 *U. Pa. L. Rev.* 291 on when inducing breach of contract may be justified; in 10 *Yale L. J.* 252 on malicious interference with employment; and in 27 *Yale L. J.* 961 on enticing away an employee.

Judicial decisions on contracts and activities of labor organizations are considered in notes in 5 *Colum. L. Rev.* 239 on contracts of labor unions in New York; 6 *Colum. L. Rev.* 54 on right of employers to contract to discharge workmen; 7 *Colum. L. Rev.* 408, 427, on remedies and damages in employment contracts; 8 *Colum. L. Rev.* 588 on legality of rules of union; 10 *Colum. L. Rev.* 652, 674, on combination to prevent employment of non-union labor; 25 *Colum. L. Rev.* 647 on legality of combinations to restrict competition in services; 25 *Harv. L. Rev.* 465, 481, on legality of trade unions at common law; 2 *Minn. L. Rev.* 524, 545, on injunction against union rule of minimum of five in an orchestra; 6 *Minn. L. Rev.* 333 on forbidding "we don't patronize" announcement in a labor paper; 62 *U. Pa. L. Rev.* 130 on trade unions and contracts in

since early in 1916. This sustained by a six to three vote an injunction issued by the federal district court against officers of a labor union restraining them from seeking to induce employees to violate a so-called "yellow dog" contract by agreeing to become members of a labor union and keeping the agreement secret until the union organizers were ready to inform the employer. This case started in the federal courts by reason of diversity of citizenship and did not involve the Sherman Law or interstate commerce. While in theory the question whether a wrong was threatened depended upon the law of West Virginia, it was in the absence of any applicable statute of West Virginia a question of so-called general jurisprudence upon which the federal courts reach independent conclusions as to what is the law of the state. There was no applicable statute of West Virginia as to whether the acts were wrongful or whether injunction is the appropriate remedy. Had West Virginia sought to forbid the making of yellow dog contracts, its statute would have been unconstitutional under the Coppage Case,[15] decided by a six to three vote of

restraint of trade; 73 *U. Pa. L. Rev.* 211 on contract regulating limitation of output; 13 *Yale L. J.* 194 on competition as justification for interference with employment of fellow workmen; 30 *Yale L. J.* 280, 311, 404, 501, 618, 736, and 31 *Yale L. J.* 86 on present-day labor litigation; and 32 *Yale L. J.* 809 on rights and privileges in labor controversies.

[15] *Coppage v. Kansas* (1915), 236 U. S. 1, 35 Sup. Ct. 240, discussed in 80 *Cent. L. J.* 193; 15 *Colum. L. Rev.* 272; 28 *Harv. L. Rev.* 396, 518; 13 *Mich. L. Rev.* 497; 63 *U. Pa. L. Rev.* 566; 2 *Va. L. Rev.* 540, 551; and 24 *Yale L. J.* 677. The decision below or other decisions on similar statutes are considered in 6 *Boston U. L. Rev.* 201; 75 *Cent. L. J.* 363; 6 *Colum. L. Rev.* 193, 201; 19 *Harv. L. Rev.* 368, 379; 20 *Harv. L. Rev.* 69; 26 *Harv. L. Rev.* 83; 14 *Mich. L. Rev.* 417; 61 *U. Pa. L. Rev.* 193; 3 *Va. L. Rev.* 398; 15 *Yale L. J.* 423; and 25 *Yale L. J.* 413.

The Supreme Court's decision in the Coppage Case was in large part predicated upon its earlier decision in *Adair v. United States* (1908), 208 U. S. 161, 28 Sup. Ct. 277, which held unconstitutional the provision in the Erdman Act which made it a crime for an interstate carrier to discharge an employee because of his membership in a labor union. The Adair Case is considered in Charles R. Darling, "The Adair Case", 42 *Amer. L. Rev.* 884; Richard Olney, "Discrimination Against Union Labor—Legal?", 42 *Amer. L. Rev.* 616; Roscoe Pound, "Liberty of Contract", 18 *Yale L. J.* 454; and notes in 42 *Amer. L. Rev.* 313; 8 *Colum. L. Rev.* 301, 317; 21 *Harv. L. Rev.* 370; and 17 *Yale L. J.* 614. For other notes on the same statute or similar ones see 99 *Cent. L. J.* 219;

the Supreme Court in 1915. This decision illustrates how the power of the Supreme Court to annul state statutes not relating to injunctions may put it within the power of the Supreme Court to determine whether injunctions shall issue.

In such cases as the Hitchman Case where no statute is involved and where the federal courts get jurisdiction by reason of diversity of citizenship, the Supreme Court of the United States is in effect the unrestrained legislature to declare what acts of employees and labor organizers are wrongful and when injunction is the appropriate remedy. Lower federal courts must abide by Supreme Court rulings and disregard contrary rulings of state courts. Foreign corporations will usually be able to initiate actions in federal courts rather than in state courts by picking as defendants only those who are not citizens of the state in which the corporation is chartered. States may not forbid foreign corporations to invoke the aid of federal courts[16] or expel them for doing so.[17] They may, however, forbid foreign corporations to engage in manufacture within their borders[18] and by requiring them to become domestic may retain for the state courts jurisdiction of disputes that do not involve interstate commerce or citizens of other states.

While the Supreme Court picks the applicable law in diversity-of-citizenship cases where statutes are not involved, the Supreme Court does not issue the injunction. It merely decides on appeal whether an injunction was wrongly or rightly issued or denied by the federal district judge. The injunction proceedings in the Hitchman Case were begun in the federal district court on October 24, 1907. A restraining order was issued on the filing of the bill and continued as a temporary injunction on May 26, 1908. A perpetual injunction was issued on January 18, 1913. Though the decree was reversed by the Circuit Court of Appeals on June 1, 1914, a stay was

16 *Harv. L. Rev.* 221; 20 *Harv. L. Rev.* 499; 1 *Mich. L. Rev.* 142; 10 *Yale L. J.* 256; and 14 *Yale L. J.* 237.

On the validity and collateral effects of contracts to employ only union labor, see 2 *Colum. L. Rev.* 123; 18 *Harv. L. Rev.* 471; 19 *Harv. L. Rev.* 368, 387; 36 *Harv. L. Rev.* 890; 2 *Wis. L. Rev.* 369; 20 *Yale L. J.* 411; and 28 *Yale L. J.* 611.

[16] *Barron v. Burnside* (1887), 121 U. S. 186, 7 Sup. Ct. 931.

[17] *Terral v. Burke Construction Co.* (1922), 257 U. S. 529, 42 Sup. Ct. 188.

[18] *Waters-Pierce Oil Co. v. Texas* (1900), 177 U. S. 28, 20 Sup. Ct. 518.

granted pending resort to the United States Supreme Court. This court granted certiorari on March 13, 1916, heard arguments on March 2 and 3, 1916, and reargruments on December 15 and 16, 1916, and finally on December 10, 1917, over ten years after the injunction had been issued, decided that it had been rightly issued. A decision that it had been wrongly issued would not at that late date have restored the parties to the position that they should have been in a decade earlier.

Thus a single federal district judge may issue an injunction in clear disregard of applicable Supreme Court doctrine and not be reversed by the Circuit Court of Appeals or by the Supreme Court until long after his temporary injunction has effectively disposed of the issue to the wrongful prejudice of the defendants. A district judge who writes a recital of established Supreme Court doctrine has a wide discretion in finding whether there are facts which bring the case within the doctrine justifying an injunction. To a large extent this discretion is in plain fact unreviewable.[19] A conclusion on the facts which is plainly unwarranted may effectively settle the controversy to the wrongful prejudice of the defendants. It is to be remembered that it is contempt to disobey a temporary injunction even though in later appellate proceedings the injunctive decree is set aside.[20]

That employers are not unaware of the advantages of resort to the federal courts as compared with some state courts is apparent from the effort unsuccessfully made in *Niles-Bement-Pond Co. v. Iron Moulders Union*,[21] decided by a

[19] In the well-known Rochester Garment Case—*Michaels v. Hillman* (1920), 112 Misc. 395, 183 N. Y. Supp. 195—Judge Rodenbeck's opinion seems to announce principles of law perhaps more favorable to the labor union than those to which it was entitled under the decisions of the New York Court of Appeals and yet to decide the case against it on the facts as found by him. His conclusion may have been warranted, but such warrant is hardly to be found in his recital. The fact that he but weakly supported his conclusion shows that the bite of the law depends largely upon the interpretations which trial judges choose to put upon a confused and complex conglomeration of testimony. No review by an appellate court, even with technical power to review the facts, can be an adequate safeguard against a leaning by a trial court to decide questions of credibility and weight of evidence so as to render reversal difficult.

[20] *Howat v. Kansas* (1922), 258 U. S. 181, 42 Sup. Ct. 277, page 70 *infra*.

[21] (1920) 254 U. S. 77, 41 Sup. Ct. 39, noted in 6 *Va. L. Reg. n.s.* 692. The decision in the court below in its substantive aspects is considered in Howard C. Joyce, "Strikes and their Conduct", 23 *Law Notes* 105.

vote of seven to two in 1920. There was a strike in the plant of an Ohio corporation by Ohio employees. The Ohio corporation was a subsidiary of a New Jersey corporation. The New Jersey corporation sought an injunction in the federal district court for Ohio, making its Ohio subsidiary one of the defendants. As the contracts involved were made with the Ohio corporation, that corporation was a necessary party. The District Judge granted an injunction restraining the strikers from interfering with those who continued to work, but the Circuit Court of Appeals and the Supreme Court held that the Ohio corporation, though an essential party, should because of its control by the New Jersey corporation be aligned with it as party plaintiff rather than as one of the defendants and that therefore the requisite diversity of citizenship was absent.[22] Allegations that the case involved interstate commerce and contracts with the United States Government were found to be "much too casual and meager to give serious color to the claim . . . . that the cause of action is one arising under the laws of the United States." In this case the injunction was granted at least as early as October 9, 1917, on which day

[22] The reason why the Ohio corporation was a necessary party was that it was the employer and that the dispute necessarily involved the contract between it and the striking employees. Unless it were made a party, the decree would not be binding upon it. If the New Jersey corporation should fail to get a decree in a proceeding to which the Ohio employing corporation was not a party, the latter corporation could begin a new action and litigate the issue over again. This was the reason why the court could not entertain jurisdiction to give equitable relief without having before it all the parties essential to a complete ending of the litigation. Equally clear was it that the employing Ohio corporation completely owned by the petitioning New Jersey corporation had no interest adverse to the latter. As Mr. Justice Clarke puts it:

"That there was no, and could not be any, substantial controversy, any 'collision of interest' between the petitioner, the New Jersey corporation, and the Tool Company, the Ohio corporation, is, of course, obvious from the potential control which the ownership of stock by the former gave it over the latter company, and from the actual control effected by the membership of the boards of directors and by the selection of executive officers of the two companies, which have been described.

"Looking, as the court must, beyond the pleadings, and arranging the parties according to their real interest in the dispute involved in the case . . . , it is clear that the identity of interest of the Tool Company with the petitioner required that the two be aligned as plaintiffs, and that with them so classified, the case did not present a controversy wholly between citizens of different states, within the jurisdiction of the district court" (254 U. S. 77, 81-82).

the District Judge filed an opinion with language far from drab. It was not until November 6, 1918, over a year later, that the Circuit Court of Appeals decided that the injunction should not have been issued for the reason that the District Judge should not have taken jurisdiction. The case of federal jurisdiction was so palpably weak that it is hard to escape the suspicion that there must have been substantial rather than procedural reasons for invoking the arm of the federal rather than of the state court.

The next injunction case to reach the Supreme Court was *Duplex Printing Co. v. Deering*,[23] decided in 1921. This reversed by a six to three vote the refusal of a District Judge to issue on behalf of a Michigan manufacturing corporation an injunction against union officials who in New York endeavored to prevent the use of plaintiff's products by threats of strikes against those who bought, used or handled them. Federal jurisdiction had obtained both under the Sherman Act and diversity of citizenship. The question was whether such a boycott had been legalized and rendered immune from injunction by the Clayton Act, as the District Court and Circuit Court of Appeals had held. The majority held that neither the dispute nor the parties came within the restrictive provisions of the Clayton Act. The reference in the Act to suits between the employers and employees[24] was said to be con-

[23] (1921) 254 U. S. 443, 41 Sup. Ct. 172, considered in Alpheus T. Mason, "The Labor Clauses of the Clayton Act", 18 *Amer. Pol. Sci. Rev.* 489; and notes in 21 *Colum. L. Rev.* 258; 19 *Mich. L. Rev.* 628; and 1 *Wis. L. Rev.* 187. The effect of the Clayton Act on the power to issue an injunction against a railway strike is considered in 8 *Minn. L. Rev.* 345.

For discussions of the labor provisions of the Clayton Act, published prior to Supreme Court decisions, see Daniel Davenport, "An Analysis of the Labor Sections of the Clayton Anti-Trust Bill", 80 *Cent. L. J.* 46; Edwin E. Witte, "The Doctrine that Labor is a Commodity", 69 *Ann. Amer. Acad. Pol. and Soc. Science* (No. 158) 133; and notes in 30 *Harv. L. Rev.* 632 and 66 *U. Pa. L. Rev.* 267. In the article by Mr. Mason, *cit. sup.*, 18 *Am. Pol. Sci. Rev.* 489, at page 491, note 3, are references to the following discussions in non-technical periodicals prior to the Supreme Court decision: "Labor is not a Commodity", 9 *New Republic* 112 (Dec. 2, 1916); Edwin E. Witte, "Section 20 of the Clayton Act", 9 *New Republic* 243 (1916); Edwin E. Witte, "The Clayton Bill and Organized Labor", 32 *Survey* 360; and Wm. H. Taft, 39 *Rep. Am. Bar Ass'n* 371-380.

[24] The first paragraph of Section 20 of the Clayton Act reads as follows:

"That no restraining order or injunction shall be granted by any court of the

fined to suits between employers and employees "substantially concerned as parties to an actual dispute respecting terms or conditions of their own employment, past, present, or prospective." In dissenting Mr. Justice Brandeis pointed out that "Congress did not restrict the provision to employers and workingmen *in their employ*" and said that the adoption of a strict technical construction would deny the statute application to disputes between a manufacturer and strikers who by the strike had ceased to be his employees. The majority held further that this was not a dispute "concerning terms or conditions of employment" within the words of the Clayton Act, for the reason that the defendant labor-union officials, not being employees of the plaintiff, were not parties to a dispute concerning terms of employment. Mr. Justice Brandeis replied that this ruling was founded upon a misconception of the facts.

If neither the controversy nor the parties came within the restrictive clauses of the Clayton Act, as the majority thus discovered, there was no need to go further and consider what specific acts were within or without the later paragraph of the statute which began by saying that "no such injunction shall issue to restrain"[25] etc., since the word "such" before the

United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney."

[25] This second paragraph of Section 20 of the Clayton Act, which follows immediately the first paragraph quoted in note 24 *supra*, reads as follows:

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike

word "injunction" confined the ensuing specific clause to injunctions issued in suits and between parties held to be embraced within the preceding clause. Mr. Justice Pitney had already pointed out that "the restriction upon the use of the injunction is in favor only of those concerned as parties to such a suit as is described." Nevertheless he went on to consider what acts are embraced within the specific clauses, under the assumption that "the qualifying effect of the words descriptive of the nature of the dispute and the parties concerned is further borne out by the phrases defining the conduct that is not to be subjected to injunction or treated as a violation of the laws of the United States."[26] Thereby he

benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any thing or act which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

[26] Of course it might be proper for the court to render a two-legged decision and say that, even if the parties to the dispute might be thought to be within the first paragraph of Section 20, the conduct here involved was not within the immunity conferred by the second paragraph. This, however, is not what Mr. Justice Pitney does. He has some notion that the conduct described in the second paragraph throws light upon the parties and the disputes embraced in the first paragraph. What he relies on are the recurring words "peaceful or lawful" and "party to such dispute." This, however, in no way shows that by "party to such dispute" Congress meant only employees having or desiring immediate relations with the employer whose product was the subject of the boycott. As Mr. Justice Brandeis points out in his dissent:

"When centralization in the control of business brought its corresponding centralization in the organization of workingmen, new facts had to be appraised. A single employer might, as in this case, threaten the standing of the whole organization and the standards of all its members; and when he did so the union, in order to protect itself, would naturally refuse to work on his materials wherever found. When such a situation was first presented to the courts, judges concluded that the intervention of the purchaser of the materials established an insulation through which the direct relationship of the employer and the workingmen did not penetrate; and the strike against the material was considered a strike against the purchaser by unaffected third parties. . . . But other courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself. . . .

"So, in the case at bar, deciding a question of fact upon the evidence introduced and matters of common knowledge, I should say, as the two lower courts apparently have said, that the defendants and those from whom they sought cooperation have a common interest which the plaintiff threatened. This view is

was enabled to declare in advance what boycotting would be deemed subject to an injunction in a case in which the dispute and the parties were within the Clayton Act, though in the case before the court both dispute and parties were held to be outside the Clayton Act.

The pertinent phrases of the specific clause are that "no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert," from "persuading others by peaceful means" to cease "to perform any work or labor" or from "persuading others by peaceful and lawful means" to cease "to patronize or employ any party to such dispute." Mr. Justice Pitney observes that "the subject of the boycott is dealt with specifically in the 'ceasing to patronize' provision" and declares that "to instigate a sympathetic strike in aid of a secondary boycott cannot be deemed 'peaceful and lawful' persuasion." He fails to note that the words "or lawful" were not in the preceding phrase which forbade an injunction to prohibit persons from persuading others by peaceful means to cease to perform any work. The injunction which the Supreme Court ordered went so far as to cover mere persuasion of employees to decline to work on the boycotted articles. This technically did not introduce into the Clayton Act the words "or lawful" where Congress had omitted them, since the court had already laid down that the case was not within the restrictive clauses of the Clayton Act. Nevertheless the dicta in the opinion on the interpretation of the clauses not involved in the case were an augury that they might be held to mean something different from what they

in harmony with the views of the Court of Appeals of New York. For in New York, although boycotts like that in *Loewe v. Lawlor*, 208 U. S. 274, are illegal because they are conducted not against a product, but against those who deal in it, and are carried out by a combination of persons not united by common interest, but only by sympathy (*Auburn Draying Co. v. Wardell*, 227 N. Y. 1), it is lawful for all members of a union, by whomever employed, to refuse to handle materials whose production weakens the union (*Bossert v. Dhuy*, 221 N. Y. 342; *P. Reardon v. Caton*, 189 App. Div. 501, 178 N. Y. Supp. 713; compare *Paine Lumber Co. v. Neal*, 244 U. S. 459, 471)."

Through all the verbiage of Mr. Justice Pitney's opinion it is apparent that that he is choosing between two opposing common-law rules and then reading his choice into the language of Congress. There is, to my mind, no indication that Congress intended this choice. The most that can be said is that Congress left it possible for the Supreme Court to make such a choice.

said in a case in which it could not be denied that they were applicable.

One does not need to read between the lines of Mr. Justice Pitney's opinion in the Duplex Case to see that his enterprise of literary interpretation was influenced by an independent preference for the result he succeeded in reaching. He observed that changes in the law laid down in interpreting the Sherman Act are not to be inferred. Mr. Justice Brandeis thought that the Clayton Act was designed to substitute some specific tests of legality for the previous views of differing judges as to the requirements of the Sherman Law. Mr. Justice Pitney's leaning against taking Congress as intending anything important is indicated by his statement that "Section 20 [the one restricting the issue of injunctions] must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States, and upon the general operation of the Anti-Trust Laws,—a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public. . . ."[27] Mr. Justice Pitney does not note that it might

[27] 254 U. S. 443, 471. A later passage in the opinion discloses even more explicitly that the majority of the court are reading their personal views into the statute:

"The extreme and harmful consequences of the construction adopted in the court below are not to be ignored. The present case furnishes an apt and convincing example. An ordinary controversy in a manufacturing establishment, said to concern the terms or conditions of employment there, has been held a sufficient occasion for imposing a general embargo upon the products of the establishment and a nation-wide blockade of the channels of interstate commerce against them, carried out by inciting sympathetic strikes and a secondary boycott against complainant's customers, to the great and incalculable damage of many innocent people far remote from any connection with or control over the original and actual dispute—people constituting, indeed, the general public upon whom the cost must ultimately fall, and whose vital interest in unobstructed commerce constituted the prime and paramount concern of Congress in enacting the Anti-Trust Laws, of which the section under consideration forms, after all, a part" (254 U. S. 443, 478-479).

The court below, whose construction would have entailed such "extreme and harmful consequences" consisted of Judges Rogers, Hough and Learned Hand. Judge Rogers was in the minority of one. Had Judges Hough and Hand been on the Supreme Court in place of any two of Chief Justice White and Justices

also be borne in mind that prior to the Clayton Act no injunction could rightfully issue under the Sherman Law at the suit of a private party. It does not seem strange that Congress in adding the remedy of injunction to the remedy of triple damages desired to restrict drastically its use in labor disputes. If the earlier case of *Paine Lumber Co. v. Neale*[28] is to be taken at its face value, Congress by the Clayton Act, taken as a whole, was not imposing an exceptional and extraordinary restriction upon the equity powers of the United States courts in enforcing the Anti-Trust Laws, but was adding to those equity powers and making clear that its addition was designed to be a limited one. The passage as a whole, with its reference to the "corresponding detriment to the general public" reveals the strong leaning of the majority to reach the result of making the Clayton Act a further curb on labor tactics rather than a curb on the interposition of equity. Mr. Justice Pitney writes as though he were resenting a new restriction on equity powers when what he had to deal with was a limitation on a new addition to equity powers.

While the Duplex Case was being decided there was pending before the court another case in which the application of the Clayton Act to picketing was involved. This was *American Steel Foundries v. Tri-City Central Trades Council*,[29] which was first argued on January 17, 1919, over a year before the Duplex Case was argued. The Tri-City Case was reargued on October 5, 1920, and again on October 5 and 6, 1921, and finally decided on December 5, 1921. This decision of 1921 ordered the District Judge to modify an injunction

McKenna, Day, Van Devanter, Pitney and McReynolds, the decision in the Supreme Court would have gone the other way. Had the case been brought in the New York Court of Appeals, the decision would have been the other way. For a number of years the New York Court of Appeals has been by far the most able and distinguished of our state courts, and few judges of the lower federal courts have enjoyed such high esteem as Judges Hough and Hand. The assurance of Mr. Justice Pitney in the inevitability of his conclusions must for the rest of us be somewhat shaken by this weight of judicial authority against him.

[28] Note 12, *supra*.

[29] (1921) 257 U. S. 184, 42 Sup. Ct. 72, considered in 10 *Georg. L. J.* 94; 6 *Minn. L. Rev.* 252; 70 *U. Pa. L. Rev.* 102; 8 *Va. L. Rev.* 298; and 31 *Yale L. J.* 408.

issued in 1914, seven years earlier. Whether the defendants thereupon proceeded to resume the conversation which had been in abeyance during the interim, I have not been able to ascertain.

The Tri-City Case got into the federal courts as a suit by a New Jersey corporation against Illinois employees and labor officials. It was not brought under the Sherman Law. The District Judge had enjoined picketing and persuasion. The Circuit Court of Appeals modified the injunction by eliminating the order against persuasion and by restricting the order against picketing to picketing conducted in a threatening or intimidating manner. The Supreme Court held that the two defendants who were striking employees were entitled to the benefit of the restraints of the Clayton Act. One of these restraints forbade the issue of injunctions against any persons, whether singly or in concert, from recommending, advising, or persuading others by peaceful means to terminate any relation of employment. The benefit conferred in the case at bar was to allow but one representative at each point of ingress and egress of the plant. Apparently there was but a single gate to the enclosure surrounding the plant, so that each employee came out by that same door wherein he went. This would entitle the strikers to one representative. Such representatives, says the Chief Justice, "should have the right of observation, communication and persuasion,[30] but with special

[30] The restraint from persuasion which the district judge had included in his injunction was eliminated by the Supreme Court not only in favor of the ex-employees who came within the interpretation of the scope of the Clayton Act, but also in favor of the other defendants who were members of an organization composed of representatives of thirty-seven trade unions of the vicinity. After reciting the pre-existing employment situation in the complainant's plant, the Chief Justice says:

"It is thus probable that members of the local unions were looking forward to employment when complainant should resume full operation, and even though they were not ex-employees within the Clayton Act, they were directly interested in the wages which were to be paid.

"Is interference of a labor organization by persuasion and appeal to induce a strike against low wages, under such circumstances, without lawful excuse and malicious? We think not. Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for

admonition that . . . . they shall not approach individuals together, but singly, and shall not, in their single efforts at communication or persuasion, obstruct an unwilling listener by importunate following or dogging his steps."

"Singly or in concert", says the Clayton Act.[31] "Not together, but singly", says the Chief Justice in interpreting it. The rule thus laid down was, however, confined to the case at bar in which, seven years earlier, there had been some violence. More latitude may be allowed in quieter strikes. As to picketing, the Circuit Court's qualification of "in a threatening or

the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages in their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership, and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda, without more, to be without excuse and malicious. The principle of the unlawfulness of maliciously enticing laborers still remains, and action may be maintained therefor in proper cases; but to make it applicable to local labor unions in such a case as this seems to us to be unreasonable" (257 U. S. 184, 209-210).

This recognition of a solidarity of interest among the laborers in a restricted industrial area is of course capable of extension by one who might discover that widely-separated plants may compete with each other. The explanation of the apparent inability of some courts thus to enlarge their vision lies very likely in a judgment that the interests of employers and of the purchasing public are to be preferred to the interests of workingmen to promote their aims by the boycotts and the enticements to break "yellow-dog" contracts which have been judicially condemned.

[31] It may be noted that these words "singly or in concert" thus included in the Clayton Act of October 15, 1914, were not included in the Arizona statute (Section 1464 of the Revised Statutes of Arizona, 1913) dealt with in *Truax v. Corrigan,* note 45 *infra,* though otherwise the Arizona statute reads almost word for word like the Clayton Act.

intimidating manner" was stricken out, and all picketing was enjoined. It is not clear that this strictness is to be confined to turbulent strikes. "Picketing" is a "sinister name", says the opinion. "The name 'picket' indicated a militant purpose, inconsistent with peaceable persuasion." Such logophobia might have asked that the Progressive Convention in 1912 should sing "Abide with Me" rather than "Onward Christian Soldiers." The Chief Justice recognizes that his views and his abhorrence of the word picket are not shared by all courts.[32] In states whose courts do not enjoin picketing, employers will naturally seek the federal courts if they are foreign corporations or can claim interference with interstate commerce. What the Chief Justice laid down was of no great importance to the case at bar, for the strike had ended seven years earlier. Its wider significance was to appear two weeks later in *Truax v. Corrigan,*[33] which had been under consideration for a year and a half before the Tri-City Case was decided.

Before taking up *Truax v. Corrigan,* it is well at this point to break into the chronology of the story to tell what labor disputes come within the purview of the Sherman Law. *United States Leather Workers v. Herkert*[34] presents the familiar story of an injunction issued by a single federal judge and sustained by the Circuit Court of Appeals only to be later dissolved by the Supreme Court because the trial court was without jurisdiction. The case involved a strike with attendant picketing in 1920 and a Supreme Court decision in 1924 that interstate trade was not involved. The claim to federal

[32] On the legality of picketing and the issue of injunctions against it, see 51 *Amer. L. Rev.* (*U. Pa. L. Rev.*) 703; 52 *Am. L. Rev.* (*U. Pa. L. Rev.*) 531; 7 *Calif. L. Rev.* 276; 10 *Calif. L. Rev* 82; 98 *Cent. L. J.* 37; 99 *Cent. L. J.* 383; 6 *Colum. L. Rev.* 124; 18 *Colum. L. Rev.* 372; 21 *Colum. L. Rev.* 103; 27 *Colum. L. Rev.* 190; 12 *Cornell L. Q.* 226; 11 *Georg. L. J.* (No. 1) 52; 15 *Harv. L. Rev.* 482; 18 *Harv. L. Rev.* 471; 40 *Harv. L. Rev.* 896; 10 *Iowa L. Rev.* 79; 5 *Mich. L. Rev.* 712; 15 *Mich. L. Rev.* 671; 20 *Mich. L. Rev.* 242; 21 *Mich. L. Rev.* 786; 1 *Minn. L. Rev.* 437; 64 *U. Pa. L. Rev.* 849; 4 *Wis. L. Rev.* 308; 17 *Yale L. J.* 623; 28 *Yale L. J.* 200, 707; 36 *Yale L. J.* 557; and 37 *Yale L. J.* 249.

In 24 *Harv. L. Rev.* 504 is a note on statutory prohibition of picketing.

[33] (1921) 257 U. S. 312, 42 Sup. Ct. 124, note 45 *infra.*

[34] (1924) 265 U. S. 457, 44 Sup. Ct. 623, considered in 19 *Ill. L. Rev.* 351; 3 *Tex. L. Rev.* 105; and 34 *Yale L. J.* 206.

jurisdiction was founded on the fact that ninety per cent of the output of the factory is customarily shipped in interstate commerce. Sanction of such a claim, observed the Chief Justice, would bring every strike within federal jurisdiction, provided an appreciable amount of the manufacturer's product enters into interstate commerce. The added remark that "we cannot think that Congress intended any such result" invites the possible inference that strikes held not to be within the Sherman Law might still be brought within federal jurisdiction by a more specific Congressional enactment. Justices McKenna, Van Devanter and Butler deemed no further legislation necessary and announced their dissent from the reversal of the two courts below.

How little more is needed to make a strike an interference with interstate commerce within the authoritative interpretation of the Sherman Law is apparent from the famous Coronado Case which thus far has been twice before the Supreme Court. This was an action for damages against striking employees and union labor officials. The first verdict for the mining corporation was reversed on the ground that the local unions had confined their efforts to restriction of manufacture and that the International Union had not participated in the restraint.[35] On the second trial, in which new evidence was introduced to meet the deficiencies pointed out by the Supreme

[35] *United Mine Workers v. Coronado Co.* (1922), 259 U. S. 344, 42 Sup. Ct. 570, considered in Marjorie Jean Bonney, "Federal Intervention in Labor Disputes", 4 *Minn. L. Rev.* 467, 550; James B. McDonough, "Liability of an Unincorporated Union Under the Sherman Law", 10 *Va. L. Rev.* 304; W. Lewis Roberts, "Labor Unions, Corporations—The Coronado Case", 5 *Ill. L. Q.* 200; W. A. Shumaker, "The Coronado Coal Case", 26 *Law Notes* 105; Wesley A. Sturges, "Unincorporated Associations as Parties to Actions", 33 *Yale L. J.* 406; and notes in 10 *Calif. L. Rev.* 506; 22 *Colum. L. Rev.* 684; 11 *Georg. L. J.* 68; 5 *Ill. L. Q.* 126; 1 *Tex. L. Rev.* 114; 9 *Va. L. Rev.* 52; 2 *Wis. L. Rev.* 51; and 32 *Yale L. J.* 37. Much of the discussion in the articles and notes cited is concerned with the ruling in the case that unincorporated labor associations are subject to suit for damages under the Sherman Law. On the issue of the citizenship of a labor union from the standpoint of jurisdiction of the federal courts by reason of diversity of citizenship, see 38 *Harv. L. Rev.* 510; 9 *Minn. L. Rev.* 282; and 34 *Yale L. J.* 564. On the status of unincorporated unions under the Sherman Law see 30 *Harv. L. Rev.* 263, 297 and 2 *St. Louis L. Rev.* 122 for discussions prior to the principal case. The liability of unincorporated associations at common law in England is considered in notes in 15 *Harv. L. Rev.* 311, 317, on the famous Taff Vale Railway Case.

Court, there was a directed verdict for the defendants. This, however, was reversed by the Supreme Court,[36] which held in effect that the awareness of the local unions that de-unionization in Arkansas would imperil unionization in competing mines in other states was evidence of intention to interfere with interstate commerce which should go to the jury.[37] Thus it appears that if local strikers are conscious of striking not for their own sake alone but for the sake of union employees in other states who might be affected by competition between their employers and the employer of the striking Good Samaritans, the jury is at liberty to infer that the strike runs afoul of the Sherman Law. It was in 1925 that this case, begun in 1914, was sent back for its third trial.

How thin is the line between interference with interstate commerce and interference with mere manufacture or building is shown by the contrast between *Industrial Association v. United States*[38] and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association.*[39] The former case involved an

[36] *Coronado Coal Co. v. United Mine Workers* (1925), 268 U. S. 295, 45 Sup. Ct. 551, discussed in 74 *U. Pa. L. Rev.* 321 and 35 *Yale L. J.* 111.

[37] "The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act. . . . We think there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of non-union coal and prevent its shipment to markets of other states than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines, and that the direction by the district judge to return a verdict for the defendants other than the International Union was erroneous" (Mr. Chief Justice Taft in 268 U. S. 295, 210).

[38] (1925) 268 U. S. 64, 45 Sup. Ct. 403, commented on in 21 *Ill. L. Rev.* 403. For a review of this decision and the Leather Workers' Case and the second Coronado Case, see 26 *Colum. L. Rev.* 538-547.

[39] (1927) 274 U. S. 37, 47 Sup. Ct. 522, considered in Alexander B. Royce, "Labor, the Federal Anti-Trust Laws, and the Supreme Court", 5 *N. Y. Univ. L. Rev.* 19; Edwin E. Witte, "The Journeymen Stonecutters' Decision and Other Recent Decisions Against Organized Labor", 17 *Am. Labor Legis. Rev.* 139; and notes in 40 *Harv. L. Rev.* 1154; 22 *Ill. L. Rev.* 444; 26 *Mich. L. Rev.* 198; 3 *Notre Dame Lawy'r* 104; 1 *St. John's L. Rev.* 189, 213; 2 *U. Cin. L. Rev.* 497; 14 *Va. L. Rev.* 112, 132; 4 *Wis. L. Rev.* 250; and 37 *Yale L. J.* 84.

injunction brought by the United States under the Sherman Law against California building contractors and dealers in building materials who combined to limit sales of materials to employers who pursue an open-shop policy modestly called "The American Plan." The restrictions were for the most part confined to materials of California origin, but their application to materials of extra-state origin was said not to involve the Sherman Law because it did not touch the materials until after their interstate commerce had ended. This is in accord with the general rule which divides state from national power.

The Bedford Stone Case was an injunction against a General Stone Cutters' Union with local branches in many states, restraining it from ordering its members not to work on stone produced by the plaintiff. Of course the stone had ceased its interstate transit and had come to rest before the stone-cutters could work on it, as the plaster and other extra-state materials in the Industrial Association Case had ceased their interstate transit before the dealers refused to sell them to employers who used union labor. The difference seems to be that the dealers in California combined to withhold materials of past extra-state origin merely to keep them from being worked on by union labor, while the stone-cutters combined to keep from working on materials of past extra-state origin in order to keep the materials from coming across state lines to be worked on.[40]

[40] To these cases should be added *Anderson v. Shipowners Association* (1926), 272 U. S. 359, 47 Sup. Ct. 125, noted in 36 *Yale L. J.* 578, in which an individual sailor on behalf of himself and others similarly situated successfully invoked the Sherman Law and the Clayton Act to enjoin a combination of shipowners from maintaining an association to which was given complete control over the hiring of seamen to work on the ships of the constituent members of the association. In distinguishing the cases relied on by the defendants, Mr. Justice Sutherland said:

"Here, however, the combination and the acts complained of did not spend their intended and direct force upon a local situation. On the contrary, they related to the employment of seamen for service on ships, both of them instrumentalities of, and intended to be used in, interstate and foreign commerce; and the immediate force of the combination, both in purpose and execution, was directed toward affecting such commerce. The interference with commerce, therefore, was direct and primary, and not, as in the cases cited, indirect and secondary" (272 U. S. 359, 364).

So far as I am aware, this is the only Supreme Court decision in which work-

The boycott in the Stone Cutters Case was perfectly peaceful. The opinion did not make the point that the controversy and the parties were not within the Clayton Act, but went solely on the ground that the Duplex Case had settled that the restraint here imposed was unlawful under the Sherman Law and not made lawful or immune from injunction by the Clayton Act. The majority recognize that the legality of such a peaceful boycott is a question on which state courts differ,[41] but they hold it unlawful under the Sherman Law because they prefer the view that it is unlawful. Justices Sanford and Stone confine their concurrence to recognition that the Duplex Case is authority for the majority view. They were not members of the court when the Duplex Case was decided. Mr. Justice Stone goes further and says that in the light of the policy of the Clayton Act toward organized labor and in the light of the decisions in the Standard Oil and Tobacco Cases[42] he should not have thought such a boycott

ingmen have successfully invoked the Sherman and Clayton Acts on their own behalf, and this case holds no more than that the bill of the complainant states a case arising under the two Acts.

For law-review discussions of instances of invocation of legal remedies by employees, see 51 *Am. L. Reg.* (*U. Pa. L. Rev.*) 803 on rights of employees against an employer's blacklist; 1 *Mich. L. Rev.* 142 on forbidding employers to blacklist employees; 33 *Yale L. J.* 215 on enjoining a baker from displaying a sign reading "No Scabs Here"; and 16 *Harv. L. Rev.* 215, 222, on a case denying equitable jurisdicion to enjoin breach of contract to employ only union labor, on the ground that there is adequate remedy at law. In 78 *Cent. L. J.* 272 is a discussion of a statute compelling employers advertising for employees to state when there is a strike, and in 6 *Ill. L. Rev.* 412 a consideration of the discriminatory features of a statute forbidding deceit in hiring workmen.

[41] For discussions of the legality of boycotts and the issue of injunctions against them see, in addition to the articles cited in note 10, *supra:* Howard C. Joyce, "Boycotts", 74 *Cent. L. J.* 263; and notes in 14 *Colum. L. Rev.* 532; 23 *Colum. L. Rev.* 578; 30 *Colum. L. Rev.* 882; 1 *Cornell L. Q.* 133; 3 *Cornell L. Q.* 75; 22 *Harv. L. Rev.* 458; 27 *Harv. L. Rev.* 478, 497; 10 *Iowa L. Rev.* 79; 21 *Mich. L. Rev.* 786; 1 *Minn. L. Rev.* 437; 63 *U. Pa. L. Rev.* 113; and 27 *Yale L. J.* 539, 569. On the proposal to legalize the secondary boycott, see 29 *Harv. L. Rev.* 86.

[42] *Standard Oil Co. v. United States* (1911), 221 U. S. 1, 31 Sup. Ct. 502, and *United States v. American Tobacco Co.* (1911), 221 U. S. 106, 31 Sup. Ct. 632. These are the cases which reversed prior interpretations of the Sherman Law and held that it prohibits, not all restraints of interstate trade, but only those deemed immoderate or unreasonable. The cases are reviewed and law-review discussions of them are cited in 6 *Minn. L. Rev.* 203-206.

as this an unreasonable restraint. Justices Holmes and Brandeis dissent and think that the Duplex Case involved a different and more serious restraint than this and is therefore not authority for the decision here.[43] Three Circuit Judges had held that the defendants were within their rights in conducting such a boycott and had affirmed the District Judge in refusing to issue an injunction. Thus of the thirteen judges who participated in the controversy, only five disclose independent views in favor of the decision, and seven announce independent views against it.

So much for the scope of the Sherman Law[44] and for the

[43] Mr. Justice Brandeis relates in detail the differences between the boycott here involved and that condemned in the Duplex Case. Obviously the differences were sufficient to make the problem quite different from that of the earlier case. Mr. Justice Sutherland goes much too far when he says that "with a few changes, in respect of the product involved, dates, names and incidents, which would have no effect upon the principles established, the opinion in *Duplex Printing Press Co. v. Deering, supra,* might serve as an opinion in this case." The principles established in the earlier case are of necessity dependent upon the incidents of the case, unless courts are to decide other cases than those actually before them. When Mr. Justice Sutherland goes on to say that "the object of the boycott there was precisely the same as it is here, and the interferences with interstate commerce, while they were more numerous and more drastic, did not differ in essential character from the interferences here", he means that he chooses to regard as not essential the differences in the methods and the extent of the restraint. This is not applying an established rule, but is making a new rule. Mr. Justice Stone in his concurring opinion points out that the decree of the earlier case went so far as to enjoin the kind of persuasion involved in the second case. This is correct; but, as Mr. Chief Justice Taft pointed out in the Tri-City Case, the restraint imposed by the decree may vary with the situation disclosed by the record. To enjoin even persuasion where there had been intimidation and threats against strangers, does not require that persuasion be enjoined where there has been nothing but persuasion.

[44] Mention may be made of *United States v. Brims* (1926), 272 U. S. 549, 47 Sup. Ct. 169, which sustained as proper under the Sherman Law a conviction of persons involved in a combination of Chicago manufacturers, contractors and union carpenters under an agreement whereby only union carpenters would be employed by the manufacturers and contractors, and the union carpenters would refuse to install non-union made millwork. The agreement applied to non-union millwork wherever made, and the mills actually most affected were chiefly outside of Illinois. In declaring that a case was made out under the Sherman Law, Mr. Justice McReynolds observed: "It is a matter of no consequence that the purpose was to shut out non-union millwork made within Illinois as well as that made without. The crime of restraining interstate commerce through combination is not condoned by the inclusion of intrastate commerce as well."

Supreme Court's views of picketing and boycotting that are to be deemed unreasonable. These views will be applied by federal courts in cases arising under the Sherman Law notwithstanding contrary views held by state courts or prescribed by state statutes. Views held by state courts will be disregarded by federal courts in cases in which jurisdiction obtains by reason of diversity of citizenship. In such cases, however, the federal courts must follow applicable state statutes. A state statute in the same words as the Clayton Act might be interpreted by a state court to mean something more than the Clayton Act conveyed to the majority of the Supreme Court. The state court's interpretation of the state statute would be accepted by the Supreme Court. The statute as thus interpreted would have to be applied in diversity-of-citizenship cases unless the Supreme Court should hold the state statute unconstitutional. This issue of constitutionality arose in *Truax v. Corrigan*[45] and was decided against the state statute by a five-to-four vote of the Supreme Court. Arizona had a statute almost identical with the Clayton Act. The Arizona court had thought that the statute meant what it said and that therefore no injunction should issue against

[45] (1921) 257 U. S. 312, 42 Sup. Ct. 124, considered in Everett P. Wheeler, "Injunctions in Labor Disputes and Decisions of Industrial Tribunals", 8 *A. B. A. Jour.* 506; and notes in 2 *Bost. U. L. Rev.* 124; 10 *Calif. L. Rev.* 237; 22 *Colum. L. Rev.* 252; 7 *Cornell L. Q.* 251; 20 *Mich. L. Rev.* 657; 8 *Va. L. Rev.* 374; 28 *W. Va. L. Q.* 144; 31 *Yale L. J.* 408.

In 16 *Law Notes* 73 is a note on prohibiting actions against trade unions for torts.

A Massachusetts case to the same effect as *Truax v. Corrigan* is considered in 16 *Colum. L. Rev.* 683 and 30 *Harv. L. Rev.* 75, 85.

The injunctive remedy in labor disputes is discussed in 7 *Ill. L. Rev.* 320, 333; 8 *Ill. L. Rev.* 126; 16 *Law Notes* 168; 12 *Mich. L. Rev.* 415; 1 *Minn. L. Rev.* 71; 59 *U. Pa. L. Rev.* 340; 20 *Yale L. J.* 216, 329; and notes in 21 *Mich. L. Rev.* 786 on "conclusions or emotions"; in 23 *Mich. L. Rev.* 52 on nebulous injunctions; and in 73 *U. Pa. L. Rev.* 185 on injunctions to restrain criminal acts. Of course the determining question in many disputes over injunctions is the substantive one of the legal quality of the act complained of. Many of the law-review discussions combine the issue of substance with the issue of equitable jurisdiction. I have classified these references to law reviews as best I can without re-examination of the printed discussions, but the results are bound to be unsatisfactory. The enterprise of gathering the references and of forcing them into some sort of arrangement has been such a wearisome one that I am in no mood to try to improve the grouping notwithstanding my recognition of the great opportunity for improvement.

peaceful picketing. It held that picketing is peaceful if unaccompanied by force or violence. It held the statute constitutional and remarked that it legalizes peaceful picketing. The Supreme Court declared that such an interpretation would render the statute obnoxious to the due-process clause of the Fourteenth Amendment, if applied to picketing that is intimidating and coercive though free from physical force.

The real question in the case was whether it was unconstitutional for the state court to withhold the injunction at the behest of the statute. The Supreme Court did not hold that mere prohibition of injunctive relief is beyond the competence of the state legislature. It did hold, however, that the employer in the case at bar was denied the equal protection of the laws by being deprived of an injunction against intimidating picketers who were his employees when he would not have been denied an injunction against intimidating picketers who were his competitors.[46] He was deprived of equal protection because his desired remedy was denied him against some instead of against all. The absurdity of such a ground of decision was amply exposed in the dissenting opinion of Mr. Justice Pitney.[47] Only an overwhelming desire to reach the

[46] Mr. Chief Justice Taft quotes such generalities as "all men are equal before the law", "this is a government of laws and not of men", and "no man is above the law", and declares: "Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so." This may be so, if a majority of the Supreme Court allows one of their number to declare it so. The fallacy in the argument given in its support is apparent from an analogy adduced by the Chief Justice. He supposes a statute making it a crime for all but ex-employees to picket and use abusive language, and then asks: "Is it not clear that any defendant could escape punishment under it on the ground that the statute violated the equality clause of the Fourteenth Amendment?" Of course it is, if the discrimination against those not ex-employees were thought unreasonable. A competitor could claim that he was discriminated against in favor of ex-employees. So in the situation at bar, if an injunction were sought against a competitor, he might claim that he was discriminated against in favor of ex-employees. The employer, however, is not discriminated against because his rights against competitors are more extensive than his rights against employees.

[47] "Examination shows that it does not discriminate against the class to which plaintiffs belong in favor of any other class. . . .

"It is said that because, under other provisions of the Arizona statute law, plaintiffs would have been entitled to an injunction against such a campaign as

result could have induced such an intellectual strain as the majority opinion indulges in. Apparently the majority were not ready to hold that statutory withdrawal of injunctive relief would deny due process of law. Such a ruling might have realism behind it if it were conceded that it would deny due process to legalize coercive picketing and that the only effective relief against such picketing is relief by injunction. Rights without effective remedies are not very effective rights. Here then was a tenable position, though a novel position and one that has many considerations of judgment against it. It would open the door to numerous judicial difficulties in the future. The position actually taken may avoid some of these difficulties but it must always excite intellectual amazement.

The effect of this majority opinion in *Truax v. Corrigan* is, as Mr. Justice Pitney puts it, "to transform the provision of the Fourteenth Amendment from a guaranty of the 'protection of equal laws' into an insistence upon laws complete, perfect, symmetrical." The door is now open for the Supreme Court to declare that any statute of a state that limits injunctive relief is unconstitutional unless it completely abolishes equity jurisdiction. This will be little more of a strain than the strain already sanctioned by adjudication. Arizona's particular discrimination would be removed if it forbade injunctions against picketing generally instead of only in labor disputes, but it still might be possible to get five Justices to find that a plaintiff is discriminated against if he loses the

that conducted by defendants had it been in a controversy other than a dispute between employer and former employees—for instance, had competing restaurant keepers been the offenders—refusal of relief in the particular case by force of section 1464 is undue favoritism to the class of which defendants are members. But I submit with deference that this is not a matter of which plaintiffs are entitled to complain under the 'equal protection' clause. There is no discrimination *against them;* others situated like them are accorded no greater right to an injunction than is accorded to them. . . . Cases arising under this clause of the Fourteenth Amendment pre-eminently call for the application of the settled rule that before one may be heard to oppose state legislation upon the ground of its repugnance to the Federal Constitution, he must bring himself within the class affected by the alleged unconstitutional feature. . . .

"A disregard of the rule in the present case has resulted, as it seems to me, in treating as a discrimination what, so far as plaintiffs are concerned, is no more than a failure to include in the statute a case which, in consistency, ought, it is said, to have been covered—an omission immaterial to plaintiffs" (257 U. S. 312, 349-351).

opportunity to get an injunction against a specified act instead of against all acts. It therefore seems hardly worth while to speculate as to ways in which states might possibly restrict their own courts in issuing injunctions in labor disputes. Those ways must pass muster with a far-away court which has written an opinion which can be used as a precedent for any result that it wishes to reach.

A few other results which the Supreme Court has thus far reached with respect to injunctions in labor disputes remain to be catalogued. The Kansas Industrial Court plan of compulsory arbitration was declared unconstitutional in *Wolff Packing Co. v. Court of Industrial Relations,*[48] decided in 1923. The actual decision was that an employer may not be compelled by mandamus to put into effect an order of an administrative body with regard to wages in a packing house when the order is the fruit of a statute under which it would be a crime for the employer to cease operations to defeat the

[48] (1923) 262 U. S. 522, 43 Sup. Ct. 630, discussed in Minor Bronaugh, "Business Clothed with a Public Interest Justifying State Regulation", 27 *Law Notes* 87; William L. Huggins, "Just What Has the Supreme Court Done to the Kansas Industrial Act? Why Did It Do It?", 11 *A. B. A. Jour.* 363; C. Petrus Peterson, "Industrial Courts", 3 *Neb. L. B.* 487; Herbert Rabinowitz, "The Kansas Industrial Court Act", 12 *Calif. L. Rev.* 1; Sidney Post Simpson, "Constitutional Limitations on Compulsory Industrial Arbitration", 38 *Harv. L. Rev.* 753; and notes in 12 *Calif. L. Rev.* 35; 96 *Cent. L. J.* 273; 38 *Harv. L. Rev.* 1097; 22 *Mich. L. Rev.* 135; and 33 *Yale L. J.* 196.

For discussions prior to the Supreme Court decision, see John T. Clarkson, "The Industrial Court Bill", 6 *Iowa L. Bull.* 153; J. S. Dean, "The Fundamental Unsoundness of the Kansas Industrial Court Law", 7 *A. B. A. Jour.* 333; John A. Fitch, "Government Coercion in Labor Disputes", 80 *Ann. Amer. Acad. Pol. and Soc. Science* (No. 179) 74; William L. Huggins, "A Few of the Fundamentals of the Kansas Industrial Court Act", 7 *A. B. A. Jour.* 265; H. W. Humble, "The Court of Industrial Relations in Kansas", 19 *Mich. L. Rev.* 675; Fred H. Peterson, "Industrial Court", 85 *Cent. L. J.* 352; F. Dumont Smith, "The Kansas Industrial Court", 47 *Rep. Am. Bar Ass'n* 208, and 95 *Cent. L. J.* 456; "Practical Operation of Kansas Industrial Court Law", 8 *A. B. A. Jour.* 680; William R. Vance, "A Proposed Court of Conciliation", 1 *Minn. L. Rev.* 107; "The Kansas Court of Industrial Relations with its Background", 30 *Yale L. J.* 456; George W. Wickersham, "Recent Extensions of State Police Power", 54 *Amer. L. Rev.* 801; J. S. Young, "Industrial Courts with Special Reference to the Kansas Experiment", 5 *Minn. L. Rev.* 39, 185, 353; and notes in 20 *Mich. L. Rev.* 893; 6 *Minn. L. Rev.* 69, 159, 251; and 31 *Yale L. J.* 75, 206, 889. Still earlier discussions of the problem of arbitration of industrial disputes are cited in note 54, *infra.*

compulsory arbitration feature of the Act.[49] The opinion made it clear that it would be deemed equally unconstitutional to forbid the employees to conspire to strike in resistance to an order of the arbitration tribunal, but this observation was carefully restricted to enterprises in which no compelling public necessity requires continuity of operations.[50] Indeed Mr. Chief Justice Taft went so far as to imply that the decision sustaining the Adamson Law[51] had definitely established that

[49] A similar ruling was made in *Wolff Packing Co. v. Court of Industrial Relations* (1925), 267 U. S. 552, 45 Sup. Ct. 441, with regard to the statutory authority granted to an administrative board to fix the hours of labor in the industries covered by the Kansas Industrial Relations Act. The court did not pass upon the independent power to fix hours of labor but held that the power conferred was unconstitutional because inseparably connected with the system of compulsory arbitration. This decision is considered in Minor Bronaugh, "Compulsory Arbitration of Wages and Hours of Labor—End of Kansas Industrial Relations", 29 *Law Notes* 28; William L. Huggins, "Just What Has the Supreme Court Done to the Kansas Industrial Act? Why Did It Do It?", 11 *A. B. A. Jour.* 363; Dexter Merrian Keezer, "Some Questions Involved in the Application of the 'Public Interest' Doctrine", 25 *Mich. L. Rev.* 596; and a note in 24 *Mich. L. Rev.* 59.

In 17 *Colum. L. Rev.* 174 is a review of mediation and arbitration statutes, and in 22 *Mich. L. Rev.* 49 a note on conciliation of labor controversies under the North Dakota Act of 1921.

[50] "These words refute the view that public regulation in such cases can secure continuity of a business against the owner. . . . If that be so with the owner and employer, *a fortiori* must it be so with the employee. It involves a more drastic exercise of control to impose limitations of continuity growing out of the public character of the business upon the employee than upon the employer; and without saying that such limitations upon both may not be sometimes justified, it must be where the obligation to the public of continuous service is direct, clear, and mandatory, and arises as a contractual condition, express or implied, of entering the business either as owner or worker. It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service" (262 U. S. 522, 541).

The so-called implied contract by which the worker might agree to continuity of labor is of course merely a possible judicial fiat that certain employments may be so essential to the public welfare that the legislature or the court may impose upon those engaged therein the duty not to quit in such a manner as seriously to interrupt the service.

[51] *Wilson v. New* (1917), 243 U. S. 332, 37 Sup. Ct. 298, discussed in Arthur A. Ballantine, "Railway Strikes and the Constitution", 17 *Colum. L. Rev.* 502; Charles W. Bunn, "The Supreme Court and the Adamson Law", 1 *Minn. L. Rev.* 395; Frank Warren Hackett, "The Adamson Act Decision", 52 *Amer. L.*

the right of employees of extensive railway systems "to demand wages and leave the employment individually or in concert was subject to limitation by Congress because in a public business which Congress might regulate under the commerce power." There were remarks to that effect in the opinion of Mr. Chief Justice White in the Adamson Law Case,[52] but

Rev. 23; Albert M. Kales, "Due Process; The Inarticulate Major Premise and the Adamson Act", 26 *Yale L. J.* 519; Thomas Reed Powell, "The Supreme Court and the Adamson Law", 65 *U. Pa. L. Rev.* 607; and notes in 84 *Cent. L. J.* 256, 317; 17 *Colum. L. Rev.* 422, 445; 30 *Harv. L. Rev.* 739; 10 *Me. L. Rev.* 180; and 26 *Yale L. J.* 496. For discussions prior to the Supreme Court decision see Malcolm H. Laucheimer, "The Constitutionality of the Eight Hour Railroad Law", 16 *Colum. L. Rev.* 554; Thomas Reed Powell, "Due Process and the Adamson Law", 17 *Colum. L. Rev.* 114; Harry T. Smith, "The Eight Hour Railway Wage Law", 4 *Va. L. Rev.* 83; and notes in 30 *Harv. L. Rev.* 63; 20 *Law Notes* 164; and 10 *Me. L. Rev.* 54. The situation which led to the passage of the Adamson Law is related in E. C. Robbins, "The Trainmen's Eight-Hour Day", 31 *Pol. Sci. Quart.* 541; 32 *Pol. Sci. Quart.* 412.

[52] "Here again it is obvious that what we have previously said is applicable and decisive, since whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he desires, to them, and, by concert of action, to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied, and the resulting right to fix, in case of disagreement and dispute, a standard of wages, as we have seen, necessarily obtained" (243 U. S. 332, 352-353).

On the problem of the power to forbid strikes in employments other than those clearly private, see Arthur A. Ballantine, "Railway Strikes and the Constitution", 17 *Colum. L. Rev.* 502; Marjorie K. Baumgartner, "The Thirteenth Amendment and Strikes on Public Utilities", 6 *Bi-Mon. L. Rev.* 109; S. H. Kauffman, "Limiting the Right to Strike", 84 *Cent. L. J.* 121; Walter B. Kennedy, "Law and the Railroad Labor Problem", 32 *Yale L. J.* 553; Blewett Lee, "The Thirteenth Amendment and the General Railway Strike", 4 *Va. L. Rev.* 437; Philip Wager Lowry, "Strikes and the Law", 21 *Colum. L. Rev.* 783; O. R. McGuire, "The Injunction and the Railroad Strike", 11 *Georg. L. J.* 1; P. A. Pare, "The Right to Enforced Labor Notwithstanding the Thirteenth Amendment", 7 *Bi-Mon. L. Rev.* 4; Thomas I. Parkinson, "Constitutional Aspects of Compulsory Arbitration", 7 *Proc. Acad. Pol. Sci.* (N. Y.) 44, in no. 1 of vol. VII, entitled "Labor Disputes and Public Service Corporations"; George Jarvis Thompson, "Labor and the Law in the Public Utility Field", 21 *Mich. L. Rev.* 1; and notes in 35 *Harv. L. Rev.* 459, 474, and 20 *Mich. L. Rev.* 548 on Judge Anderson's injunction against the coal strike; in 7 *Cornell L. Q.* 61 on injunction against a strike at the suit of the state; in 10 *Georg. L. J.* (no. 2) 119 on prohibition of strikes by statute; in 34 *W. Va. L. Q.* 176 on injunction against a coal strike; and in 17 *Ill. L. Rev.*

they were gratuitous. The only Supreme Court decision on the right of railway employees to strike is *Ex parte Lennon*,[53] decided in 1897, which held no more than that an engineer may be punished for contempt in violating an injunction not to boycott certain cars, when his announcement that he was quitting the service was regarded as a mere trick or device to evade the injunction. Thus the issue whether a court may compel the performance of a contract of personal service did not fairly arise.[54]

440; 21 *Mich. L. Rev.* 90; and 71 *U. Pa. L. Rev.* 83 on injunction against a railway strike. For a discussion of "Strike Injunctions Obtained by the United States" see Zechariah Chafee, Jr., *The Inquiring Mind* (New York; Harcourt, Brace and Company, 1928), pp. 198-216. This is preceded by a section on "Strike Injunctions Obtained by Coal Operators" (pp. 190-197). For discussions prior to 1910 see 37 *Amer. L. Rev.* 285, 461, on injunction against persuading railway employees to strike, and 16 *Harv. L. Rev.* 518, 524, on the Wabash injunction against a peaceful strike.

[53] (1897) 166 U. S. 548, 17 Sup. Ct. 658.

[54] By the Transportation Act of 1920 Congress created a Railroad Labor Board with power to hear controversies between carriers and representatives of employees, to pass judgment thereon and to communicate its decisions to the parties and to designated governmental authorities, and to give its action such further publicity as it might determine. The provisions of the statute are reviewed in 25 *Colum. L. Rev.* 882. Complaints of a carrier against action of the Board in allowing employees to vote for labor organizations as their representatives at conferences before the Board and of the threatened action of the Board in giving publicity to the fact that the carrier had disregarded the decision of the Board were held in *Pennsylvania Railroad Co. v. Railroad Labor Board* (1923), 261 U. S. 72, 43 Sup. Ct. 278, to have no constitutional basis, since the Board was not vested with any coercive power. The decision is discussed in 2 *Wis. L. Rev.* 500. In *Pennsylvania Railroad System v. Pennsylvania Railroad Co.* (1925), 267 U. S. 203, 45 Sup. Ct. 307, and *Pennsylvania System Board v. Pennsylvania Railroad Co.* (1925), 267 U. S. 219, 45 Sup. Ct. 312, the court refused to enjoin the defendant carrier from withholding compliance with the orders of the Labor Board and going ahead with its own plan of selecting representatives of employees to confer with it and enter into agreements respecting wages and conditions of employment. The cases are noted in 38 *Harv. L. Rev.* 986, and an anticipatory discussion appears in 38 *Harv. L. Rev.* 374, 402. An issue as to the claims of employees with respect to reductions not sanctioned by the Labor Board is discussed in 22 *Colum. L. Rev.* 682.

For earlier discussions of the problem of arbitration of industrial disputes and of foreign experience with arbitration tribunals see Henry Winthrop Ballantine, "Evolution of Legal Remedies as a Substitute for Violence and Strikes", 69 *Ann. Amer. Acad. Pol. and Social Science* (no. 158) 140; James H. Brewster, "A Comparison of Some Methods of Conciliation and Arbitration

Prior to this square decision on the Kansas statute, a punishment for contempt for disobeying an order not to call a strike was sustained by the Supreme Court in *Howat v. Kansas*[55] upon the finding that the Kansas court had issued the injunction independently of any enforcement of the Industrial Relations Court Act and that therefore no federal question was presented. The state court had held that the question of the validity of the injunction could not be raised collaterally as a defense to a proceeding for contempt for violating it. The Supreme Court recites that this is established law.[56] The thing to do is to obey and await the long process of appellate adjudication to find out if the injunction was wrongfully issued.

The Kansas statutory prohibition against calling a strike

of Industrial Disputes", 13 *Mich. L. Rev.* 185; L. Ward Bannister, "The Administrative Settlement of Industrial Disputes by Compulsory Arbitration", 2 *Cornell L. Q.* 163; W. Jethro Brown, "The Judicial Regulation of Industrial Conditions", 27 *Yale L. J.* 425; "Effect of an Increase in the Living Wage by a Court of Industrial Arbitration Upon Vested Rights and Duties Under Pre-existing Awards", 32 *Harv. L. Rev.* 892; "The Separation of Powers in British Jurisdictions", 31 *Yale L. J.* 24; Henry B. Higgins, "A New Province for Law and Order", 29 *Harv. L. Rev.* 13; 32 *Harv. L. Rev.* 189; 34 *Harv. L.* Rev. 105; S. H. Kauffman, "Limiting the Right to Strike", 84 *Cent. L. J.* 121; George S. Ramsay, "The Power and Duty of the State to Settle Disputes Between Employer and Employee", 51 *Amer. L. Rev.* 801; Howard S. Ross, "The Canadian Industrial Dispute Investigation Act", 2 *Cornell L. Q.* 176; Carl I. Wheat, "American Legislation for the Adjustment of Industrial Disputes", 28 *W. Va. L. Q.* 29.

[55] (1922), 258 U. S. 181, 42 Sup. Ct. 277, noted in 31 *Yale L. J.* 889.

[56] "An injunction duly issuing out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them, however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law, going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished" (258 U. S. 181, 189-190).

The state court had invoked the Debs Case for the proposition that quite aside from the Industrial Court Act the lower court had power to issue the injunction "on principles identical with those applied in abatement of public nuisances." If state courts choose to forbid strikes without invoking any statute in support of their decree, there is no federal question as a basis for review by the United States Supreme Court.

came before the Supreme Court in two other cases, both called *Dorchy v. Kansas*. The first decision[57] sent the case back to the state court to determine whether the anti-strike provision was separable from the rest of the Court of Industrial Relations Act which had been declared unconstitutional. The Kansas court held that it was and affirmed the conviction for disobeying the statute. The Supreme Court sustained the conviction[58] on the narrow ground that the statute was here applied only against an order to strike to compel an employer to pay a disputed stale claim of an employee. Strikes for such a purpose may be forbidden and those who call them may be punished criminally.[59] Presumably a statutory command to enjoin the calling of a strike for this purpose would also be sustained.

The advantage to employers of the injunctive process as compared with civil actions or prosecutions for crime is not confined to the superiority of prevention over recompense or punishment. It is easier to get an order from one man than

[57] *Dorchy v. Kansas* (1924), 264 U. S. 286, 44 Sup. Ct. 323, noted in 13 *Calif. L. Rev.* 81.

[58] *Dorchy v. Kansas* (1926), 272 U. S. 306, 47 Sup. Ct. 86, commented on in 40 *Harv. L. Rev.* 626; 21 *Ill. L. Rev.* 727; 5 *No. Car. L. Rev.* 244; and 75 *U. Pa. L. Rev.* 268. In the Lawyers' Edition of the Supreme Court Reports, volume 71, pages 248-268, is an extended note on "Purposes for which Strike may Lawfully be Called."

[59] "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. . . . To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. . . . And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike" (272 U. S. 306, 311, per Mr. Justice Brandeis).

The legality of strikes, liabilities for strikes, and the issue of injunctions against strikes are considered in 13 *Colum. L. Rev.* 66, 79; 17 *Harv. L. Rev.* 135, 140, 285; 19 *Harv. L. Rev.* 68; 20 *Harv. L. Rev.* 243; 21 *Harv. L. Rev.* 635; 22 *Harv. L. Rev.* 234; 26 *Harv. L. Rev.* 259, 277; 39 *Harv. L. Rev.* 101, 128; 10 *Mich. L. Rev.* 637; 15 *Mich. L. Rev.* 673; 16 *Mich. L. Rev.* 57, 137; and 18 *Yale L. J.* 425. In 31 *Yale L. J.* 320 is a consideration of what is a strike.

a verdict from twelve. Proceedings for contempt for alleged violation of an injunction are traditionally heard by a single chancellor who finds the facts, adjudges guilt or innocence and prescribes what shall be done in case of guilt. This, as all good lawyers know, is not criminal prosecution or punishment, though the result may be the imposition of a fine or imprisonment. Untutored laymen who have been fined or incarcerated upon the order of a single judge for disobedience of an injunction have appreciated that the procedure is not that of criminal prosecution but have felt that the results are not strikingly different. In response to such a feeling, Congress provided by the Clayton Act that disobedience to an injunction by acts which are also a crime should upon demand of the offender be proceeded against in an action in which the "trial shall conform, as near as may be, to the practice in criminal cases." A federal district judge declined to follow the command of the statute on the ground that it was unconstitutional. The Circuit Court of Appeals agreed with him on the theory that the power of the federal courts to deal with contempts without interposition of a jury is inherent in the judicial power derived from the Constitution. The Supreme Court in *Michaelson v. United States*[60] interpreted the statute as confined to criminal contempts and sustained it when further confined to acts committed out of the presence of the court, acts which are positive crimes and not mere failures to comply affirmatively with some decree. These restrictive interpretations of the statute were confessedly the product of a desire to avoid the so-called grave constitutional issues which would be presented if the statute were accorded the wider scope which its language might allow.[61]

[60] (1924) 266 U. S. 42, 45 Sup. Ct. 18, considered in 25 *Colum. L. Rev.* 229; 10 *Cornell L. Q.* 215; 38 *Harv. L. Rev.* 259; 19 *Ill. L. Rev.* 449; 13 *Ky. L. J.* 236; 9 *Minn. L. Rev.* 368, 378; 4 *Oregon L. Rev.* 145; 3 *Tex. L. Rev.* 206. For discussions prior to the Supreme Court decision, see Felix Frankfurter and James M. Landis, "Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers", 37 *Harv. L. Rev.* 1010, reprinted in 58 *Amer. L. Rev.* 696, 818; and notes in 37 *Harv. L. Rev.* 486, 499; and 33 *Yale L. J.* 791.

[61] These restrictions of the statute amount practically to emasculation. It will not be applied to civil contempts, and judges on motion of the complainant may entertain civil proceedings instead of criminal proceedings. It does not apply when the acts enjoined are not crimes, and the Supreme Court has made rules

Thus the power of the federal courts over civil contempts is by adjudication left untouched by Congress and by inference it must continue to be left untouched. The inference does not necessarily extend to state efforts to restrict state courts in the matter of civil contempts, since state restriction of state judicial power does not of itself present a federal constitutional question. If, however, such a restriction is deemed to deprive suitors of rights and remedies which the Supreme Court thinks a decent government should give them, the deprivation may be adjudged to be a denial of the due process or of the equal protection of the laws required by the Fourteenth Amendment. With *Truax v. Corrigan*[62] as a precedent, the Supreme Court that sustained the emasculated Clayton Law provision because of its narrow scope might call a similarly narrow state regulation a denial of equal protection of the laws because it was not broader.

This concludes the survey of the ground already covered by Supreme Court decisions. We have speculated somewhat, though vainly, as to what the court would do about possible state statutes designed to secure for strikers and boycotters some further shields against the strong arm of the state judiciary. The Truax Case makes one wonder also what the Supreme Court would do if Congress should forbid the federal courts to issue injunctions in cases in which the Supreme Court thinks injunctions ought to issue. There would not be the equal-protection clause to invoke, but it has been hinted that severe inequalities would offend due process of law, and Congress is restricted by a due-process clause. There is the principle of the separation of powers to invoke if the court thinks that the legislature has sought to deprive it of something which is of the essence of judicial power. The jurisdiction of the lower federal courts may be restricted by Congress, but the Supreme Court has declared that Congress is restricted in prescribing how jurisdiction conferred shall be exercised.[63]

of law authorizing the enjoining of boycotting and picketing which are not only not crimes but are not even a basis for an action for damages under the common law as revealed to the courts of some states.

[62] Note 45, *supra*.

[63] In the Michaelson Case, note 60, *supra*, 266 U. S. 42, at pages 65-66, Mr. Justice Sutherland says:

"But it is contended that the statute materially interferes with the inherent

We do not know that the court would let Congress overrule *Swift v. Tyson*[64] and make federal courts follow decisions of state courts on common-law issues. The Sherman Law could be repealed; but could it be amended so as not to apply to designated acts of labor organizations? It would be a terrible strain to hold that it could not, and it would be hard to hurdle the Paine Lumber Case[65] to hold that Congress could not withhold the remedy of injunction from all private persons or from all designated controversies. Even if there were no Sherman Law, however, there is still the Debs Case to authorize injunctions by the government against any widespread interference with interstate commerce.

Doubtless the questions we have been raising are academic, because neither Congress nor the states will be likely to pass the legislation which would raise them. Congress has thus far acquiesced in the decision that the Clayton Act with all its specifics restrained the federal courts from nothing that was previously proper. A statute full of words that seemed a balm to labor turned out upon interpretation to be chiefly a bane, and Congress has since kept still. The future law of labor injunctions bids fair to be judge-made law like so much of the law of the past,—judge-made by five-to-four decisions, often years after the practical issue had been practically settled perhaps by an erroneous decision of a trial judge. If this

power of the courts, and is therefore invalid. That the power to punish for contempts is inherent in all courts has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of this power. So far as the inferior courts are concerned, however, it is not beyond the authority of Congress . . . ; but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative."

[64] (1842) 16 Pet. (U. S.) 1. This was the decision in which Mr. Justice Story invented the doctrine of "general jurisprudence" and held that the federal courts were obeying the dictate of Congress to regard the laws of the several states as rules of decision, when these federal courts chose their own preferred common-law rule instead of following the common-law rule pleasing to the state court. For a belated criticism of this decision by one who has in his time applied it not infrequently, see Mr. Justice Holmes, dissenting, in *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.* (1928), 48 Sup. Ct. 404.

[65] Note 12, *supra*.

judge-made law is compounded more of folly than of wisdom, the major remedy seems to lie in educating the judges of the future. State judges may still be the arbiters in controversies governed by no statute and not between citizens of different states.[66] Of all other controversies the Supreme Court of the United States is the ultimate arbiter.

On issues of common law, of statutory construction, and of

[66] For general articles on law in its relation to industrial disputes, published between 1910 and 1928, see A. A. Bablitz, "Labor Unions and Their Relation to the Law in the United States", 2 *Ky. L. J.* (no. 7) 9; Jay Newton Baker, "The American Federation of Labor", 22 *Yale L. J.* 73; Newton D. Baker, "Labor Relations and the Law", 8 *A. B. A. Jour.* 731; Ernest C. Carman, "The Outlook from the Present Legal Status of Employers and Employees in Industrial Disputes", 6 *Minn. L. Rev.* 553; Walter Carrington, "Injunctions in Labor Controversies", 8 *Va. L. Reg. n.s.* 401; J. P. Chamberlain, "The Legislature and Labor Injunctions", 11 *A. B. A. Jour.* 815; John J. Coniff, "Industrial Peace", 31 *W. Va. L. Q.* 35; William R. Eaton, "The Industrial Law of Colorado", 97 *Cent. L. J.* 3; Ralph Fuchs, "Collective Labor Agreements in American Law", 10 *St. Louis L. Rev.* 1; W. M. Geldart, "The Status of Trade Unions in England", 25 *Harv. L. Rev.* 579; Robert L. Hale, "Labor Legislation as an Enlargement of Individual Liberty", 15 *Am. Labor Legis. Rev.* 154; James M. Kerr, "Union Labor Before the Law", 57 *Amer. L. Rev.* 239; John H. S. Lee, "Problems which have Arisen in Recent Labor Decisions in Illinois", 18 *Ill. L. Rev.* 77; John M. Matthews, "State Labor Legislation", 5 *Ill. L. Q.* 100; Calvert Magruder, "Labor Co-partnership in Industry", 35 *Harv. L. Rev.* 910; J. G. Pease, "Trade Unions and Trade Disputes in English Law", 12 *Colum. L. Rev.* 588; Lionel F. Popkin, "Judicial Construction of the New York Arbitration Law of 1920", 11 *Cornell L. Q.* 329; Murray T. Quigg, "Functions of the Law in Relation to Disputes between Employers and Employees", 9 *A. B. A. Jour.* 795; William Renwick Riddell, "Labor Legislation in Canada", 5 *Minn. L. Rev.* 83, 243; Ira B. Rosenblum, "The Use of Injunctions in Labor Disputes", 4 *St. Louis L. Rev.* 18, 78; Walter H. Saunders, "A Review of Recent Decisions Affecting Labor and Employment", 15 *Georg. L. J.* 361; Francis Bowes Sayre, "Inducing Breach of Contract", 36 *Harv. L. Rev.* 663; W. A. Shumaker, "Trade Unions and the Law", 22 *Law Notes* 107; Sidney Post Simpson, "Constitutional Rights and the Industrial Struggle", 30 *W. Va. L. Q.* 125; Horace Stern, "A New Legal Problem in the Relations of Capital and Labor" (on contracts between employees and a labor union not to work for two years in non-union shop), 74 *U. Pa. L. Rev.* 523; Joseph D. Sullivan, "The Supreme Court and Social Legislation", 10 *Georg. L. J.* 1; William H. Taft, "Workingmen's Combinations", 18 *Law Notes* 69; Charles Thaddeus Terry, "Law and Order in Industrial Disputes", 9 *A. B. A. Jour.* 115; Everett P. Wheeler, "Injunctions in Labor Disputes and Decisions of Industrial Tribunals", 8 *A. B. A. Jour.* 506; Edwin E. Witte, "The Doctrine that Labor is a Commodity", 69 *Ann. Amer. Acad. Pol. and Soc. Sci.* (no. 158) 133; "Early American Labor Cases", 35 *Yale L. J.* 825.

constitutional limitations, the Supreme Court has been often divided. The opinions disclose clashes of social outlook which have dictated alignments professedly on the meaning of words. Underlying the whittling process which has been applied to the several provisions of the Clayton Act has been the conception of barriers imputed to the Constitution. These conceptions when analyzed are seen to be the conceptions of the individual conceivers who have felt more keenly the damage wrought by labor tactics than the damage wrought by the interposition of equity. Equity and the Constitution are majestic words, but he who is deceived thereby is not wise. Equity and the Constitution operate through the judgments of mortal men who chance at the time to be vested with judicial power. Under our constitutional system five mortal men wield a power which in many instances is nation-wide in reach. These men are not chosen by any plan which ensures that their judgments on vexed issues of social policy shall have an intrinsic superiority over contrary judgments. As the divisions in the Supreme Court reveal, important issues of policy depend for authoritative adjudication upon the chance of the outlook and the temper of a majority of the members of the Supreme Court at the time when the issues arise. Quite aside from the question whether in the adjudications thus far made the preponderance of wisdom has been on the side of the majority or of the minority, there remains the question whether it is wise to have such questions receive their final answer from so small a number of fallible, finite men.

This question also, I take it, is academic, from the standpoint of any change in our constitutional system. I see no warrant in American political history for any prophecy that the power of the Supreme Court of the United States will some day be curbed. Minority views may some day become majority views, but this erosive process is not likely to be precipitate. Meanwhile government by injunction, as its enemies are wont to term it, has a secure place in the law. As a process of determining individual disputes, it leaves much to be desired, There is something fantastic about a process of dealing with strikes and boycotts that entrusts arbitrament to the possible error of an individual judge that may remain regnant error long enough to wield determining power on the scene of action.

One who reads the fervid opinions of not a few of the trial judges must wonder whether the writer was in any mood to hear evidence objectively and to decide dispassionately. The evils in our present procedure must be apparent to all. The evils that the system seeks to prevent are also apparent. Strikes with violence or with intimidation are not intrinsically lovely things. Boycotts directed at those not privy to the dispute which animates them are not greatly to be desired as an end in themselves. We are in a kingdom of evils where the problem is to choose the lesser of the two or to acquire from other kingdoms some other measures of amelioration that may yield a greater victory of good over evil than the measures which now prevail.

Railing at injunctions will not end their reign. They have not developed out of an absence of all need for control of the conduct of industrial disputes. Whether that control must be by public authority or whether it can be instituted by advance agreement of prospective possible disputants is a question that cannot be answered until privately instituted systems of control have shown a satisfactory standard of effectiveness. The problems are not ones in which lawyers and judges are experts. They are problems, not for debaters, but for experimenters. With the wisest judges in the world, the machinery of the law would still remain inadequate for creative contributions to the enterprise of adjusting the conflicting ambitions of those who pay for work and those who work for pay. The contributions of the Supreme Court cannot be neglected, for behind them lie the instruments of power. The power of the courts must be reckoned with in any approach to the problem, but the problem may be to develop devices so that this power need never be invoked.

INJUNCTIONS AND LABOR DISPUTES

T. YEOMAN WILLIAMS
Secretary, The League for Industrial Rights

THE condemnation of the issuance of injunctions in labor disputes is periodic. No one has any desire to stifle such condemnation. It serves the extremely useful purpose of focusing attention upon the intricate problem of regulating industrial warfare without retarding the advancement of industrial justice. Such criticism also calls for a revelation of those basic principles of judicial procedure which are of the highest value for individual and social well-being. We can only ask that the issue be clarified by verifiable statements of fact.

The source of the objection to the use of the injunction in labor disputes is in the leadership of organized labor and in the ranks of those who sympathize with the aims and objects of organized labor. While this does not in any sense invalidate the objections, it does mean that in meeting the implications of the issue we have to deal with the objections to the injunction which are raised by this group. It might be worth while as a preliminary to what we desire to emphasize to deal in a cursory way with some of the more outstanding objections.

In many discussions dealing with the issuance of injunctions in labor disputes, we are left with the impression that in the injunction we have a new legal device working in favor of the employer to the detriment of organized labor. We have to deal with such accusations as the abuse of judicial power by injunction judges, the alleged substitution of the law of equity courts for the law of the lower courts, and with other similar statements.

We must not allow ourselves to forget that the injunction is a means of applying the remedies of the equity court and that the procedure dates back to the reign of Queen Anne in 1708. As early as 1846 in the case of *Gilbert v. Mickle* there was a decision in this country by Lewis H. Sanford, Vice-

Chancellor of the State of New York, relating to a trade case, antedating a labor injunction in the United States and England. The court had before it an application for an injunction on the part of an auctioneer against a placard placed in front of the auctioneer's house containing the words, "Strangers, Beware of Fake Auctions." The grievance was picketing and placarding, and the court said:

> It is clear to my mind that the obstruction of the complainant's place of business as detailed in the bill constitutes a nuisance against which equity under ordinary circumstances is bound to relieve. Any person whose trade is injured or impaired by such an obstruction may unquestionably recover damages at law or restrain a further continuance of the nuisance by an injunction from a court of equity.

We have here an excellent illustration of the early workings of the equity court. It demonstrates the power of the court to protect the right of men to utilize their property and conduct their business without unfair or unlawful obstruction from outsiders. In applying the remedies of equity to labor disputes, the purpose and power of the equity court have not been changed.

In a current issue of *Law and Labor* (p. 75) we have a concise statement of the principles upon which the injunction is issued in labor cases:

> In order to procure an injunction, it must appear:
>
> 1. That the defendants are injuring or threatening to injure a property right.
>
> 2. That the remedy at law is inadequate for one of the following reasons:
>
> (a) That the threatened damage will be irreparable, either because the defendants will not be able to respond in an action at law, or because of the nature of the injury it will be impossible to measure the damages with reasonable accuracy.
>
> (b) That the injury will be continuous, thereby necessitating a multiplicity of suits at law.
>
> Any person threatened with irreparable injury from continuing unlawful acts may, upon a showing that such is the case, have a temporary order enjoining the acts until the parties can be heard by the court. Upon the hearing, which can always be had within two or three days upon the demand of those who are enjoined, the defendants may contradict the statement of the plaintiff, and if it appears that the conduct of the defendants is not unlawful, or the injury is not irreparable, the injunction will be discontinued. Upon the hearing, the plaintiff

must maintain a clear preponderance of the proof. In many jurisdictions, the proof upon such hearing must be given by witnesses in open court. In other jurisdictions, it can be taken by affidavit. After such hearing, the court may, in its discretion, continue the injunction until the trial of the case. The purpose of all such injunctions pending the trial of the case is merely to hold the parties in statu quo.

These principles are time-honored and well established. They were clearly defined long before the modern trade dispute made its appearance. The doctrine has not been extended to the disadvantage of any element or group in the industrial world. Injunctions have issued on these principles for the protection of property rights since the days of Queen Elizabeth.

Again it is stated that injunctions are being issued with increasing frequency and volume in labor disputes. In the recent hearing on the Shipstead Bill (S-4182) the opponents of the bill filed with the Committee a list of cases arising out of industrial disputes, covering a period of twenty-five years, in which injunctions have been issued in state and federal courts. An examination of the list reveals that at least half of the cases occurred in state courts, and unfortunately many of the cases were so inadequately described as to be incapable of identification. I question very much whether any tabulation of cases would be of any value in determining the increase in abuses in the issuance of injunctions. The procedure is liable to act as a boomerang and may be in reality a measure of the extent to which organized labor is responsible for excesses in industrial disputes rather than an index of the increasing use of the injunction.

A clear check of the reported injunctions in New York State shows an average of sixteen per cent arising from industrial disputes. A similar check in the federal courts shows that of reported injunctions only twelve per cent arise out of industrial disputes, a percentage which certainly cannot be regarded as excessively high.

We are also meeting from this source of opposition with the repeated assertion that the labor of a man is in no sense of the word a property right, but is rather and solely a human right. The spokesman for the Weekly News Service of March 17 says: "The Labor injunction issue can be summed up in these two points: If business and labor are property, the labor injunction judge is right. If business and labor are human

relations, and have no connection with property, the labor injunction judge has usurped his powers."

We are left here with the repeated fallacy of the "either—or" philosophy. The problem is presented in the form of a dilemma, that the right to labor is either a human right or a property right, whereas in reality we are compelled to recognize that it is not one or the other, but both—a human relation and also a marketable commodity, the value of which is expressed in the excellence of the work from the standpoint of its human relation values and in the extraneous reward received for the service rendered from the standpoint of its marketable value. Surely no one would think for a moment of denying that the money which a man carries in his pocket is a property right subject to the protection of the power of the equity court; and his right to earn more money is also a property right to be equally protected.

Again, the spokesmen of organized labor for the past forty years have repeatedly sought to make it plain that they were not objecting to the issuance of injunctions *per se,* but rather to the abuse of injunctive power by equity judges, in other words, the interference by the courts with what they regard as the lawful acts of organized labor. Such utterances can mean only one thing: that organized labor is complaining not about the character of the remedies which lie in the issuance of injunctions, but rather about the operation of the substantive law of the land regarding what it declares to be lawfully right and lawfully wrong for officers and members of labor organizations to do. This, I think, clarifies the issue of the objection to the use of injunctions in labor disputes. We are not dealing primarily with an objection to the use of the injunction. We are dealing primarily with what the substantive law has declared to be lawful and unlawful.

On every occasion when this issue is discussed, a very large field of activities which the law recognizes to be lawful is left entirely out of account, while the demand is made that the activities which have been repeatedly declared unlawful should by statutory provison or immunity be declared to be lawful. There is a pertinent paragraph by Justice Louis D. Brandeis of the Supreme Court, on page 26 of his volume entitled *Business,* which is significant in this connection:

> You may compromise a matter of wages, you may compromise a matter of hours—if the margin of profit will permit. No man can say with certainty that his opinion is the right one on such a question. But you may not compromise on a question of morals, or where there is lawlessness or even arbitrariness. Industrial liberty, like civil liberty, must rest upon the solid foundation of law. Disregard the law in either, however good your motives, and you have anarchy. The plea of trades unions for immunity, be it from injunction or from liability for damages, is as fallacious as the plea of the lynchers. If lawless methods are pursued by trades unions, whether it be by violence, by intimidation, or by the more peaceful infringement of legal rights, that lawlessness must be put down at once and at any cost.
>
> Likewise industrial liberty must rest upon reasonableness. We gain nothing by exchanging the tyranny of capital for the tyranny of labor. Arbitrary demands must be met by determined refusals, also at any cost.

We cannot refrain from asking just what it is that organized labor would like to make lawful through the restriction of the use of the injunction in labor disputes. For convenience, I quote a pertinent summary of this point from a current issue of *Law and Labor*:

> Should trade unions have the right to break their collective agreements?
>
> Should they have the right to wage war on neutral parties?
>
> Should a trade union have the right to inflict punishment on any member who handles open shop materials when the purpose of that enforced refusal is to compel the open shop to go out of business, or sign a contract that it does not want to sign?
>
> Should a trade union have the right to inflict punishment on any member who exercises his lawful right to buy anything he chooses, in any store he chooses, if by chance he buys anything from a merchant who sells some particular article that does not carry a union label, when the purpose is to drive that article out of the markets to the ruin of the wage-earners and investors who make it?
>
> Should wage-earners who lawfully quit their work in a body, because they are not satisfied with the terms of employment, have the right to threaten physical injury to any man or to members of the family of any man who may be satisfied to work where the wage-earners quit?
>
> Should wage-earners, having lawfully exercised their right to quit work, because they are not satisfied with the employment, have the right to misrepresent to the public the terms of employment offered them and the products of their former employer, in order to drive away members of the public who might otherwise deal with him?
>
> Should trade unions have the right to strike against railroads or utilities because without discrimination they serve non-union men and open-shop products?

Through the issuance of injunctions in labor disputes we are primarily concerned in preventing industrial warfare from becoming an instrument of industrial injustice. The problem is one of law enforcement. It affects the basic rights of employer and employee in its effect upon the right to conduct business and the right to work without interference from voluntary aggregations of men. It concerns itself with the problem of winning respect for those prevailing inhibitions against anti-social conduct which have become clearly defined and definitely protected by law—inhibitions which business institutions and private citizens are willing to respect, but which to organized labor offer definite barriers to the accomplishment of its aims. Labor says: "Set us free from the power of the injunctive processes, and we will regulate our own conduct", while the believers in the injunctive process affirm that this process is necessary so long as labor organizations persist in doing unlawful things which the substantive law of the land time after time has declared to be illegal.

We do not think that in advocating the use of the injunction and the protection of the courts we can solve all of the many problems which are involved in industrial conflict. We do feel, however, that through an impartial application of the law to the unlawful elements in both capital and labor we have been able to maintain a condition which has been a safeguard to those experiments in industrial peace which in the last analysis are the concern of all forward-looking men.

DISCUSSION—INJUNCTIONS AND FACT-FINDING IN LABOR DISPUTES

MR. MORRIS HILLQUIT (lawyer, member of the National Executive Committee of the Socialist Party): The subjects so interestingly discussed in the forenoon have one feature in common, namely, they all relate to methods of settling labor disputes; but there their kinship ends. The methods of fact-finding and of impartial adjustment of labor disputes are aids to the process of collective bargaining, while the method of the injunction is destructive of it, and it is this distinction that determines the rôle and place of these methods in the struggles of labor for material improvement. For, after all, the success or failure of these struggles is determined by the bargaining power of labor.

There is nothing mysterious in this formula. The jobs of the country are largely concentrated in the hands of a few powerful industrial concerns. The individual worker is absolutely powerless to deal with such concerns on terms of equality. It is preposterous to speak as we do of the labor contract between, say, an individual steel worker and the United States Steel Corporation, an individual automobile worker and the Ford Company or the General Motors Corporation, or an individual railroad worker and the Pennsylvania Railroad Company. The only way in which labor can meet organized capital in the labor market on terms of relative equality and actually bargain for terms of employment is by collective and organized action. If the trade union controls the supply of labor power in a certain industry to about the same extent as the trust or association of employers controls the jobs in the industry, then, and then only, will they sit down and discuss terms and strike a fair arrangement for both sides. So long as the union is weak, it will not be even recognized by the employers, as a rule, to the extent of opening negotiations for collective agreements; and even when collective agreements have been made, they do not execute themselves *ex proprio vigore*.

In other words, the conditions of labor are in the last analysis determined by the strength of the labor organization and its liberty of action, including the right to strike. It is in this field that the injunction is fatal to the labor movement and to labor standards, for the injunction sets aside the rights which are commonly recognized as being enjoyed by the workers.

Within the last twenty years, and particularly within the last ten years, injunctions in labor disputes have become so frequent in number, so sweeping, and, I say it deliberately, so indiscriminate in scope and terms, that there is practically no labor dispute of importance that is not accompanied by the issuance of an injunction. Mr. Williams has cited some figures which I must frankly confess I did not quite understand, to the effect that labor injunctions constitute only 16 per cent of the injunctions reported.[1] The reported cases mean absolutely nothing. I can tell you from my daily experience that injunctions are practically as frequent as strikes. In a majority of cases they very seriously hamper the legitimate activities of the trade unions, and in a great many cases they thoroughly paralyze such activities.

When Mr. Williams asserts that the injunctions do nothing but prohibit illegal acts which the workers cannot and do not claim to have the right to commit, he tells only one side of the story.[2] I have known of injunctions that have prohibited legal acts as well as illegal acts, prohibited strikes as such. A strike is a species of industrial warfare. To tie the hands of one of the combatants while the other is allowed compete freedom of action is not maintaining the status quo. It allows the employer to proceed with all his preparations to break the strike and does not permit the worker to resist it. It is as if, in an actual war between nations, we were to suggest that one belligerent cease activities for a few weeks or months, while the other proceeds with full force, and then say that we have maintained the status quo on the battlefield.

The workers feel — and I think they have a good right to feel — that the whole field of labor injunctions is a species of class justice. It is perfectly idle to say that it is no more than

[1] *Cf. supra*, p. 80.

[2] *Cf. supra*, p. 81.

an extension of the ordinary and long-recognized equity powers of the court. Injunctions in labor disputes are an innovation. That unfortunate auctioneer in 1846 had nothing to do with it. No labor injunctions were issued in this country until 1848. The regular practice of issuing labor injunctions began in the Federal Courts in 1892. They have been increasing in number ever since.

It is also idle to say that they operate impartially. For every injunction issued at the instance of labor against employers, hundreds are issued against workers at the instance of the employers. That ratio obtains, naturally, because the situation is such that an injunction means nothing, or very little, if directed against employers.

Mr. Williams asks the question: What substitute can be proposed? Shall labor be allowed to indulge in those excesses which are characteristic of the strike, or should such excesses be restrained? I must make the observation that labor as a whole, as a class, has not shown itself more lawless than, for instance, the capital or banking interests as a class. But what do we generally do with people who are inclined to break the law? Do we issue injunctions against them? We wait until they have committed their excesses and then the arm of the criminal law is strong enough to reach out and to find them; and so is the arm of the civil law. Organized labor is the only class that is prevented in advance from committing a threatened or an imaginary excess or crime and incidentally from performing those functions which theoretically it has a full right to perform.

A very interesting reference has been made by Professor Powell to injunctions that have been issued, say, some seven years earlier and thereafter have been held by the highest court to have been erroneously issued.[1] The law has been vindicated, the principle has been correctly established, but the strike has been lost in the meantime. That is precisely what is happening with injunctions every day of the week. An injunction is issued without hearing, without notice to the other side. The preliminary injunction is issued *ex parte* on papers submitted by the plaintiff. With all due respect to the courts of this state and to the federal courts, I venture to say

[1] *Cf. supra*, pp. 54-55.

that in a great many cases these papers are hardly read by the judge. The clerk passes upon the general sufficiency; the judge signs the injunction. The application for continuing the injunction will not come on for argument and not be determined in less than perhaps two or three weeks, and sometimes longer. Meanwhile the hands of the workers are tied, without a hearing. I venture to say that only one out of fifty or perhaps one hundred labor injunction cases comes to trial. In most cases the preliminary injunction, the *ex parte* injunction, without notice or hearing, has decided the fate of the strike.

My conclusion, therefore, is that the method of fact-finding as a means to a peaceful, impartial adjustment of labor disputes will never develop in this country so long as the employers are given an easy way of settling their disputes with the workers not on the basis of facts, not on the basis of justice, but on the basis of their ability simply to forbid any kind of strike against them. If we wish to introduce in this country, as in England and in other progressive countries, a more civilized method of warfare and adjustment of disputes between capital and labor, labor and capital must first be placed on a basis of equality, of which the injunction deprives the workers in this country.

MR. MURRAY T. QUIGG (of the League for Industrial Rights, editor of *Law and Labor,* 165 Broadway, New York City): In February I ascertained from the clerk of Part I in New York County, where the *ex parte* orders are issued, the fact that during the calendar year 1927 only 133 injunction orders were issued without a hearing, in all types of injunction cases, and less than 5 per cent of these related to labor injunctions, whereas in the part of the court where motions come on on notice, there were over 51 motions for an injunction in all types of cases heard in one month. Assuming the same ratio of labor cases in that court, we may conclude that those brought on without hearing are exceedingly few in number as compared with those that are brought on on notice of hearing; and the showing, which must be made to the court, of necessity for immediate relief in cases where an injunction is issued with an order to show cause, must be very strong. The order to show cause brings the case on the calendar within three days

and the delay in hearing depends upon the action of defendants. Of course it takes defendants in some cases four or five days, maybe a week, to prepare their defense. In a great many cases they do not even attempt to prepare their defense for two or three weeks. They do not move as rapidly as they might.

In some jurisdictions an injunction is issued *ex parte* and the defendant moves for a hearing on two days' notice, or in some instances he may never move, as in the case of one of the coal injunctions outstanding now, and yet it is charged that the defendants have been tied up for an indefinite time by an injunction on which they had no hearing. They might have had the hearing but they did not take the opportunity.

Professor Powell implied that the Supreme Court of the United States had given the Clayton Act a meaning entirely different from that intended by Congress.[1] As a matter of fact, the debates show that there was some dispute in Congress as to what it did mean; the Congressmen were not clear; several of them did inquire, on the floor, of the men reporting the bill from the committee, as to whether it was intended by the committee that the law should legalize the secondary boycott, and members of the committee said that it did not legalize the secondary boycott. If it had been intended that the act should legalize a refusal of any wage-earner to work on any product manufactured anywhere by any manufacturer, it would have been easy to say so, it would have been easy to say that this applied to disputes between any and all wage-earners and any and all capitalists. That is the interpretation which labor seeks to put upon the act, but it is not what the words of the statute say. The statute uses the term "employer and employee," and those words imply a definite personal relation between two definite persons. They do not imply a class.

MR. JULIUS HENRY COHEN (lawyer, 76 Trinity Place, New York City): It may be helpful to the reader of the record of these Proceedings if a brief reference is made to the attempt now being made by the Committee on Commerce of the American Bar Association, of which Mr. Rush C. Butler is the Chairman. The Committee held public hearings a month

[1] *Cf. supra*, p. 37 *et seq.*

or so ago, and expects to make a report to the Seattle meeting of the American Bar Association in July.

It is the purpose of the Committee to encourage the voluntary ascertainment of the facts, the voluntary settlement of controversy in industry, and the voluntary making of rules for the government of industry, and to remove such obstructions and anachronisms in the law as may now prevent the accomplishment of such results. In addition, the Committee will recommend the creation of a Federal Industrial Council which shall be representative of labor, of business as such, of management in industry, of agriculture and of the bar, this Council to have no power to make decisions or awards but to be continuously studying the problems of industry and to make recommendations to Congress and to the public generally.

It must be clear to the impartial observer that the truth of every situation is not to be found in the statements made by the advocates of one point of view or of one policy alone. As the two blades of the shears must be always brought together to be really incisive, both sides of a controversy must be heard before the truth is ascertained. It is ascertained today in conflict, not in conference. It is ascertained today in a warlike spirit, instead of in an atmosphere receptive to constructive work. It is our hope that such a Federal Council, being representative of various groups, will be able to present the truth as each sees it, and that out of the harmonization of the partial truth of all parties will come something approximating an American policy.

PART III

TRADE UNIONISM AND EMPLOYEE REPRESENTATION PLANS

TRADE UNIONISM AND EMPLOYEE REPRESENTATION PLANS[1]

HENRY R. SEAGER
Professor of Political Economy, Columbia University

I HAVE just been reading an interesting book on the labor movement in Japan. In that country large-scale machine methods of production are displacing small-scale handicraft industries as rapidly as anywhere in the world, but paternalistic relations between employers and employees still persist. As a consequence it is not unusual for employers to contribute even to the strike-benefit funds of their employees. This is in the belief that the employees are striking because they are led astray by designing labor agitators, and should not lack for the necessities of life until they are brought back to a realization that their employers are in reality their best friends and that loyalty to them is their highest duty.

We have long passed this stage in the United States. American employers often think also that their employees are misled by designing agitators when they go on strike, but I have yet to hear of one who contributes to the employees' strike fund! The gulf separating employer and employee has become too wide to permit such a gesture. Instead of mollifying the strikers it would only add to their suspicion and bitterness. This widened gulf between employers and employees opposes a serious obstacle to the further industrial progress of the United States. Instead of considering the employer as their best friend, American wage-earners have too frequently come to view him — "him" meaning usually a large corporation — as an exploiter of their labor power concerned only about profits. In consequence American strikes are more than temporary interruptions of normally peaceful and harmonious relations. Too often, as in the bituminous coal industry in Western Pennsylvania at the present moment, they

[1] Preliminary remarks by Professor Seager as presiding officer at the Second Session of the Semi-Annual Meeting of the Academy of Political Science, April 11, 1928.

have all the aspects of bitter and uncompromising warfare. How to bridge this gulf and substitute a truly cooperative spirit for the contentious and hostile attitude so often in evidence is the most difficult problem that confronts American employers.

It is a commonplace of economics that the interests of employers and employees are to some extent identical and to some extent opposed. They have a common interest in the financial success of the industry with which they are concerned. Unless it is profitable, the employer cannot long continue to pay wages, and the rates he will pay depend very much on the degree of profitableness. Had not the Ford Motor Company made profits on an unexampled scale it would hardly have begun the experiment of paying higher wages than other automobile manufacturers, nor tried the five-day week, while others operated on a six-day schedule. On the other hand it is equally certain that when it comes to the determination of wages and working conditions the interests of employers and employees are usually opposed. Other things being equal, the employer is benefited if he can get equally efficient labor for lower wages; the employee is benefited if he can get higher wages for the same expenditure of effort. This opposition of interest may be disguised but it is rarely absent. It may have been to Henry Ford's advantage to introduce the five-dollar minimum wage when he did, though other motor factories were paying substantially less, because it enabled him to attract the most efficient workers to his plants. It certainly would not have been to his advantage to have put in the present six-dollar minimum at that period of lower wages, though this would have been to the advantage of his employees. In spite of variations in detail it remains generally true that an increase in wages cuts into the employer's profits and is reluctantly granted, however advantageous it may be to the employees to receive it.

Employers like Henry Ford believe that the best way to harmonize the interests of employers and employees is for the employer to fix wages and working conditions above those in competing plants and then to organize the methods of doing the work so that these wages will be earned and a substantial profit left to the employer. But obviously all employers can-

not pay wages above those paid by other employers! Many find it difficult to pay even as much as their competitors and retain any profits for themselves. As a general formula some other plan must be found for advancing the interests which employers and employees have in common and adjusting in a fair way those which conflict.

Without anticipating unduly what will be said by later speakers, I think I may assert that there is a growing consensus of opinion that as a stimulus to effort no plan of profit-sharing, gain-sharing or bonus or premium payments, appealing to the cupidity of the worker, will take the place, in the long run, of a feeling of mutual confidence and good will between employer and employee. How to develop and maintain this feeling is the crux of the problem of industrial relations.

EMPLOYEE REPRESENTATION—A WARNING TO BOTH EMPLOYERS AND UNIONS

WILLIAM M. LEISERSON

Professor of Economics, Antioch College; Chairman Board of Arbitration, Men's Clothing Industry, New York, 1921-23; Chicago, since 1923

TO those who have heard the clamor in the ranks of organized labor against the menace of company unions, any warning to the labor movement, on this occasion, of dangers that lie in employee representation may seem quite superfluous. And remembering that employee representation is a considered policy of open-shop employers and management associations, it would seem equally superfluous to warn employers of dangers to them that lurk in the representation movement; especially when the wailing in the camps of the trade unions points to the evident success of their non-union representation policy. Nevertheless, an objective study of employee representation as a rival of American trade unionism reveals that neither the unions nor the employers fully realize the significance of the representation movement that has grown so spectacularly during the last ten years in the unorganized industries of the United States.

To sum up the misconceptions of both the unions and the employers in a paragraph is, of course, impossible. But it is well to start with such a summary in order to get the outline of the field of battle laid out for the trade unions by company unionism, as the employee representation movement is popularly known. Later we can fill in the details with modifications and explanations to make the picture clear.

On the employers' side the outstanding conception of employee representation that one finds reiterated again and again in the preambles to representation plans and in the literature and oratory of the subject is that employee representation is a device for restoring the close contact, cooperation, and friendly relations that existed between employers and employees when business was conducted on a small scale, and masters and men knew each other by their first names. At a

recent national conference on employee representation one of the conspicuous leaders in the movement pointed out that employee representation was merely a new and supplementary form of organization in industry designed to bring about friendly and cooperative human relations which the normal form of military production organization has proved inadequate to maintain. He deprecated the talk to the effect that employee representation is management sharing, industrial democracy, or a form of labor organization or collective bargaining, and maintained that employers who used these new phrases that have become current in industry were either ignorant or insincere.

Organized labor, on the other hand, ascribes all such talk to insincerity and will not even be charitable enough to ascribe it to ignorance. It coined the phrase "company union" as a term of reproach, implying in the very name an organization owned and controlled by the employer to suit his own purposes. To the trade unions, employee representation is an obvious fraud, a dishonest attempt to break the labor organizations, camouflaged with hand-picked representation to give the appearance of unionism. The terms employee representation, works-council, industrial democracy, cooperative plan, management-sharing are all held to be of the same counterfeit coinage as "Open Shop" and "American Plan," which an enlightened public will no longer accept to hide shops closed to union men and shops maintaining un-American standards and conditions.

There are individual industrial and union leaders who hold other views of employee representation than those here given. But that our summaries present the prevailing opinions among employers and unions will not be doubted by any one who has attempted serious study of the subject. It is our contention that these characterizations of employee representation, made by employers and unions themselves, will be found on investigation to reveal profound misconceptions of the results that the practical operation of employee representation plans is effecting.

And this is the warning that needs to be given to both camps —that they are confusing their notions of what they would like employee representation to be with what it actually is and

is becoming. The employers who think that employee representation is but a supplement to their management organization to insure cooperative and friendly labor relations without essentially changing the control of labor by the management, need to be warned that once an employee representation plan is launched, it tends to gather into the hands of the wage-earners more and more power and control over industry. It tends to become a union, adopting the policies and methods of trade unionism as well as organization forms and devices. If the employer, when he wakes up to this, attempts to balk this tendency he arouses opposition and a conviction among his employees that his pretensions of giving the workers a voice in industry were really insincere and dishonest. Conflict inevitably results, sometimes culminating in strikes and picketing exactly as with unions. If, on the other hand, the employer desires to avoid these results, he must make more and more concessions to the employees' organization, thus maintaining peace, but fostering a growth of power in the workers' organization.

The trade unions similarly need to be warned that the managers who sponsor employee representation plans are not the insincere, dishonest men with ulterior motives that they are made out to be. Some, no doubt, are of this character, as some labor leaders are. But to condemn a movement like employee representation which has world-wide manifestations, on the ground that it is but the result of dishonest industrial leaders, is about as intelligent as the condemnation of trade unionism on the ground that it is brought about by crooked labor leaders and designing "outside" agitators. The warning that organized labor must take to heart is that in the last six or seven years the unskilled and semi-skilled wage-earners of this country have secured more of the real results that trade unions are supposed to give them through the employee representation plans than they have through the organized labor movement. Not that they could not have obtained the same things through the labor organizations if the latter had been alive to the needs and efficient in handling the problems of the craftless workers in the mass-production industries. But the reason employee representation has grown so spectacularly is because the trade unions have failed to do their job among

the specialized workers in the large-scale industries. There is even evidence that these workers sometimes deliberately prefer company unions to the regular trade unions. With these facts available for all who wish to see them, organized labor will have to face them and develop new policies for dealing with them. Mere condemnation of employee representation as a fraud and a snare will accomplish little in this direction.

Before proceeding to outline some of the evidence in support of these warnings and conclusions, it is well to clear up any ambiguities as to the meaning of employee representation. In an all-inclusive sense the term is sometimes used to cover all forms of experimental schemes for improving labor relations, including trade-union arrangements with employers, profit sharing, employee stock-ownership, membership on boards of directors, as well as works committees and shop councils. In a narrower sense the term includes only such committees, councils, assemblies, or other forms of representation, as are established without the assistance of trade unions. It is in this narrower sense that the term employee representation is used in the present paper, and we are excluding from consideration also representation on boards of directors and profit-sharing plans. Our discussion is limited to those representation plans that refuse to recognize trade unions as legitimate intermediaries for the employees and are commonly designated as "company unions."

To a disinterested scientific student of labor relations one of the most significant facts about these company unions is that managers and business leaders have organized them avowedly as a means of providing democratic control over wages and working conditions, and that they urge the adoption of employee representation as a step toward industrial democracy. There are, of course, many employers and managers who merely follow the crowd and adopt representation plans and talk about industrial democracy without knowing what they are doing or saying, simply because it is the latest style in labor relations. The significant thing is that the really intelligent leaders, who have carefully studied employee representation and who are responsible for setting styles in management devices, should acknowledge the need and attempt to devise the administrative machinery for democratic control of industry.

Listen to what Mr. P. W. Litchfield, President of the Goodyear Tire and Rubber Company, has to say:

> It is our problem . . . to Americanize industrial management. We have all heard about Americanization and many of us think that it applies only to the individual, but when you Americanize the individual and he makes an analysis of his form of government in industry, and finds that it is not Americanized also, you are going to have more trouble than when you started, unless it is Americanized. Management in that sense is the same as government. In other words, it is a selected body to govern in the interests of all, keeping in mind that it should govern in the interests of the majority.

Henry Dennison writes:

> It may be questioned whether there is the difference between the fundamentals of the problem of industrial management and the problem of political management that some of us think there is. Some of the experiments that are being worked out in industry, even if they seem unsuccessful for a time, must nevertheless rank as experiments in the management of men on a non-autocratic basis. . . . The technique of democracy—how to manage ourselves as citizens—is not very different from the problem of how to manage ourselves as parts of a producing or distributing agency.

Edward Filene:

> Labor . . . having experienced the advantages of democracy in government, now seeks democracy in industry. Is it any stranger that a man should have a voice as to the conditions under which he works than that he should participate in the management of the city and the state and the nation? If a voter on governmental problems, why not a voter on industrial problems?

General Atterbury of the Pennsylvania Railroad has used words to the same effect. In speaking of the Pennsylvania plan of employee representation, he has said that there can be no fair play, no square deal, unless it is reciprocal. One side by itself cannot play fair. Management in most industries is organized to handle matters from the point of view of capital only. The viewpoint of labor ought to have equal weight. And he expressed the opinion that the workers' representatives, *together with* representatives of capital, should constitute the personnel department.

You may discount such utterances as being mere talk or advertising or general buncombe, given out for public consump-

tion and not really intended to be put into practice. The mere fact, however, that employers and organizers of great capitalistic enterprises find it necessary or desirable to talk industrial democracy and to advocate its establishment as an essential principle of sound management is itself of the utmost significance. For something like a hundred years the term industrial democracy has been a familiar one in the propaganda of socialists, trade unionists and various kinds of social reformers. Now the leaders of business have taken it over. Why have they done that?

Apparently, it is because they are enlightened industrial monarchs. They have seen that treating laborers as if they were commodities is unsound and wasteful economically. They have tried paternalism or benevolent autocracy, and they found that this did not work, just as Frederick the Great and his followers found that benevolent political despotism did not work. But suppose it were true that all this talk of government and democracy in industry really is insincere. What then? Does it really make much difference what the talk is about economic institutions and mass human movements? The important thing is to look at employee representation in actual practice, to observe its operations, record and study them carefully, and determine thus objectively what its relation to democracy in industry is, regardless of what people say it is and regardless of what the employer who established it thinks it is or ought to be or intended it to be. Once they are created, human organizations of this kind have a way of evolving according to laws of their own nature in quite unforeseen directions. Those who speak insincerely of industrial democracy may be speaking better than they know.

Some evidence as to the direction in which employee representation is leading appeared at the Convention of the National Personnel Association (now the American Management Association) held in Pittsburgh in 1922. The Convention was discussing the Pennsylvania Railroad's company unions, which have been much in the limelight before the Railroad Labor Board and the United States Supreme Court. Mr. Garrett of the Personnel Department of the Pennsylvania Railroad had presented General Atterbury's ideas. He then introduced a Mr. Bate, who was chairman of the company union,

elected by the employees. This is what Mr. Bate said: "General Atterbury has put something in the field that he would have a hard job to take out, and we have gotten so far we say this — we dare him to take it out."

An investigator of one of the Standard Oil Company's representation plans reports his conversations with representatives of the workers elected under the plan as follows. They told him: "The quickest way to start a strike in a refinery . . . . would be to abolish the plan of representation."

That these are not merely idle theats is shown by the investigations of works councils made by the National Industrial Conference Board. The report cites some cases in which strikes actually resulted from attempts to abolish representation schemes. And I am told that in one New Jersey city, after the Standard Oil Company had inaugurated its plan, the employees of a competing oil company threatened to strike unless their employers inaugurated a similar scheme; and the management was forced to install a representation plan.

Whatever the motives of the management may be, when it inaugurates employee representation it is handing the employees a constitution for the government of the industry. It may not be much of a constitution. It may give the wage-earners little power, few rights, and the management may think that employee representation is different from unionism because it does not provide for the right to strike. But that is quite immaterial. The management has started a movement in the direction of democracy in industry which is bound to grow. Just as the first political constitutions of European countries did not provide much democracy but gradually led to more and more democratic control by the people, so these employee representation plans may not have much democracy in them at first, yet it is inevitable that once a plan is established the workers will get more and more control over it. In the report of the National Industrial Conference Board on the works councils you will find a section entitled "Growing Power of the Councils." The Board's investigations revealed this trend and its reports cite many facts and cases indicating it.

The notion, then, that professions of industrial democracy may be insincere, or that those who establish employee repre-

sentation do not believe in democracy and do not intend to have any of it, is quite immaterial. The question is rather whether forces of self government in industry have been let loose which tend to give wage-earners more and more power and control over industry. The fact that workers threaten strikes when managers propose to use their undoubted legal right to drop representation plans, that they dare the employers to take the plans out, and that sometimes they strike to get plans inaugurated, are all straws showing the direction in which the wind is blowing.

A statement often heard among employers and managers is that trade unionism is based on force while employee representation is based on cooperation, and therefore the latter is to be favored and the former condemned. This is but the counterpart of the notion that organized labor has that company unions are bound to be ineffective because they cannot back up their demands with strikes. When we look at the situation as it exists in reality, we find that employees in company unions have just as much right to strike as those in trade unions. Company unionism is no guarantee against strikes; and the experiences of the subway company in New York City, as well as the coal strikes in Colorado in which the employees of the Colorado Fuel and Iron Company have participated, ought to be sufficient evidence to cure both the employers and the unions of this naïve notion. One company — it has a plant in Brooklyn — is realistic enough to face the facts; and it has a provision in the constitution of its representation plan which reads as follows: "The right of the employees to strike in this plant and of the management to lock-out is not impaired by this plan."

True, a company union may not carry on a strike as successfully as a national trade union with a large treasury. But there are many trade unions as helpless as the company unions are in this respect. Employers must not be lulled into a false security by the notion that company unions do not strike. And the official labor movement of the country must not ridicule the weakness and discount the power of company unionism, or it may have a dual unionism on its hands which may turn out to be more effective than any it has yet encountered.

The idea that employee representation is merely a device for restoring the close contact and friendly relations which existed when business was small and employers and employees knew each other's first names is apparently confined to the ranks of the employers. No such notion seems current among the trade unions. But of all the thoughtless platitudes about labor relations, this is about the worst. Where did class conflict, strikes and all the other evils in relations between employers and employees originate? Was it in the large plants? It requires but little study of industrial history to learn that strikes, boycotts, picketing, blacklisting, and practically all of the other paraphernalia of industrial warfare, were developed at the end of the eighteenth century and in the early part of the nineteenth, both in England and in the United States, in the small handicraft shops that prevailed at the time.

Trade unions arose in small competitive industries. That was where the most unsatisfactory labor relations have always been found. It was true not only of the past; it is true today. Where are the most bitter labor conflicts always recurring? In the building trades, in bituminous mining, in the small shops of the needle trades where employers and workers know each other all too well! Experience as an arbitrator over a period of years, and in several lines of industry, has brought the worst labor relations to my attention and the most bitter conflicts to arbitrate come from the smaller plants where personalities cannot be distinguished from industrial policies. The large establishments, with standardized policies, will not countenance the mean tricks to which people will stoop when they know each other well.

Heaven appears to most people as existing in the past. Old times appear as good times. Employers and workers knew each other's names and lived together in brotherly fashion. Nowadays business is so big, employees are known only by their numbers. Yes — but when they knew each other by their first names and not by numbers, what names did they call each other? What kind of names? No, employee representation is not in practice a scheme to bring back the close touch and bitter feeling that existed between the small master and his few employees.

Another preconception that prevents employers and unions

alike from appreciating the true effects of employee representation on what they consider sound labor arrangements, is the notion that there is only one true method of arranging cooperation between management and workers, only one right method of allowing the workers a voice in industry. If employee representation is a sound cooperative method, then the trade-union method must be unsound and uncooperative. To organized labor, in the same way, it appears that if its principles are right, therefore company unionism must be wrong.

In actual practice, however, it appears that sometimes the most effective kind of management-worker cooperation and democratic control of labor relations is brought about by employee representation, sometimes by trade unions, and sometimes by neither of them. There is no one true form of industrial democracy, as there is no one true form of political democracy. Just as some ill-informed people think that America is the only real democracy, overlooking the equally good and sometimes more effective democracies of Great Britain, Norway, Denmark, Switzerland and Canada, so some employers think that employee representation is the only form of joining workers and managers in cooperative organizations, and most labor leaders think the traditional trade unions are the only proper form of labor organization.

But if employers investigated employee representation with the same scientific objectivity that their laboratories study chemical and mechanical problems, they would soon learn that there is nothing their representation plans have accomplished which had not been achieved by some trade unions many years before them. The representation plans work exactly like trade unions. Even when they start as mere advisory committees, they tend to become more and more like unions. They use the same methods and machinery of consultation and negotiation that the collective bargaining arrangements of the unions do. Their accomplishments are the accomplishments of organized labor. Their success measures the failure of the trade unions. Their failures measure the efficiency and effectiveness of trade unionism. If employers want to avoid collective bargaining and democratic control by the workers over terms and conditions of employment, they had better beware of company unionism.

On the other hand, if organized labor studied employee representation with some scientific detachment, it would find that workers sometimes prefer company unionism to trade unionism, because they think it secures for them what the regular unions have been unable to get. They may be wrong but they think employee representation is doing the unions' job. When they are convinced that the company unions can do little for them and that the trade unions will be more effective, they will prefer the trade unions. Recently, the manager of one of the large milk companies in New York stated his conviction that unless his employee representation plan gave the workers as much as they could get from a trade union, they would go over to the trade unions. This company's experience showed, also, that the representatives were not averse to using the threat that the company's business might go to competitors if work were stopped because cases were not settled as the workers thought they should be settled. If the aims of trade unionism have been to give wage-earners some voice in determining conditions, to treat the laborer as a human spirit, rather than as a commodity of trade, to fix wages on a give-and-take basis, to reduce hours of work, and to prevent arbitrary discipline and discharge, then these same purposes have in recent years been accomplished to a considerable extent by the employee representation movement. Organized labor is in danger of having its thunder stolen. The employers have learned to fight the union's fire with a fire of their own.

There is little time for supporting data here, but a few instances may be cited. The Philadelphia Rapid Transit has one of the most successful employee representation plans in existence. Yet its aims and methods and practices are essentially those of trade unionism. In fact, the Mitten Management wanted to begin its cooperative plan with the unions. It took two votes on the question whether the employees wanted the Street Railwaymen's Union to represent them, or a company union. Both times the employees themselves voted down the proposition to join the regular union. They voluntarily chose the company-union form when the management was willing to deal with organized labor.

They now have a collective contract which is exactly the

same as a trade-union contract. They have a dues-paying organization, joint committees, arbitration, collective bargaining and all the other forms and devices of trade unionism. This plan works and is successful because it is doing what the union should have done. And recently the Street Railwaymen's Union agreed to let the company union arrangement stand in Philadelphia and Buffalo while the company agreed to unionize any other systems it may undertake to manage.

The Pennsylvania Railroad plan deals with and recognizes the Railroad Brotherhoods. It uses all the methods and machinery that the railroad unions have developed in fifty years of collective bargaining with the railroad managers. General Atterbury has publicly stated that he deals with practically 100-per-cent-unionized train crews, and his objection to the shop-craft unions and other labor organizations is mainly against their methods and management, not against union organization as such. On the other hand, Daniel Willard of the Baltimore and Ohio found the shop-craft unions on his road efficient, reasonable, and willing to cooperate. He, therefore, has union-management cooperation, while the Pennsylvania has employee representation.

Another example is the Sperry Gyroscope Company. That company worked out a representation plan and presented it to the employees who overwhelmingly voted it down. Two years later, however, the same employees came along with a plan of their own and presented it to the company, saying "Let us have this one." The management considered it, a vote was taken, and finally it was adopted. This company union, then, is the employees' own plan. What is the significance of that? To a disinterested observer it means that the managers of the regular unions were asleep. Here were employees who did not want the company's kind of employee representation. Had the union managers been awake and on the job, they might have gone to the employees and told them, "We will organize and operate the kind of representation that you do want." Then they might have established something like the Baltimore and Ohio plan. But they were asleep and the employees had to work out a plan themselves. The employees, therefore, keep away from the organized labor movement and have a company union. But what they are

trying to do is not essentially different from what the trade unions do.

In several employee representation plans, it may be added, the employees are required to pay dues, and in some they even have a closed shop. No one can work in the plant who does not belong to the company union. That is true of the plan of the Interborough Rapid Transit Company in New York. The Nunn-Busch Shoe Company of Milwaukee has a similar requirement, although its plan is far more favorable to the employees than is the Interborough Rapid Transit plan. This company and some of the mining companies that have employee representation, such as the Davis Coke and Coal Company and the Consolidated Coal Company, also have business agents or commissioners hired and paid by the employees' organization to deal with the management.

The significance of all this is that there is going on a competitive struggle for the leadership of labor between the managers of company unions and the managers of trade unions. The leaders of organized labor hardly seem aware that the competition is going on, while the leaders of the employee representation movement fail to realize how they are being led to concede the essential principles of trade unionism and to adopt the methods and practices of organized labor in order to keep the workers away from the trade-union movement.

In the one camp there are the ordinary labor leaders, most of whom learned their jobs in the bitter school of the small shop where the employer knew everybody by name. In the other, there are the increasing numbers of personnel managers and industrial relations directors who learned their jobs in Colleges of Engineering and Business Administration, where they studied labor psychology, industrial relations and scientific management. These two groups are competing for the leadership of labor in America and apparently the scientific managers and personnel directors are winning out. Trade unionism is losing in proportion as employee representation and the other devices of modern industrial relations management are growing in effectiveness. There is no danger of the trade unions' going out of existence entirely. But for the present, at least, they are more or less at a standstill, at bay, before the large-scale industries which are rapidly fortifying

themselves with company unions. It is in the automobile, electrical, steel, rubber, cement, rayon and similar industries, employing great masses of unskilled and semi-skilled labor, that the future progress of trade unionism must be made. But it is exactly in these industries that its progress has been stopped.

One reason for this situation may be that the unions have not the trained leadership the employee representation plans have in their industrial relations managers. The trade unions need trained leaders and scientific research men to aid them, such as modern personnel management is providing for the employers to lead company unions. In a way these leaders and researchers must be outsiders like the industrial relations experts who are brought in by employers from the outside to advise them in matters of labor management. These men asked new questions, and questions that seemed foolish to traditional labor managers. But that is how they learned to handle labor relations in new ways and how they developed the employee representation movement to balk the efforts of organized labor. When the trade unions learn to go outside their ranks in a similar way or to train leaders of the same kind, who will ask new questions about traditional union methods and policies and thus be led to improve them, then unionism may take a spurt again, and employee representation may not have as easy sailing as it has had up to the present.

OUR EXPERIENCES WITH EMPLOYEE REPRESENTATION

HARVEY G. ELLERD
Personnel Department, Armour and Company, Chicago

THAT there should be disputes between management and workers is the most natural thing in the world, for both are humans, and humans do not all think alike, act alike, or want the same things. Having different viewpoints, we humans generally come to different conclusions. In my opinion, the only reasonably workable rule for obviating conflicting conclusions is to get the interested parties to view their problems from each other's viewpoints, and then from a point in between. That, in a nutshell, is the accomplishment of employee representation as exemplified at Armour and Company.

The practice of looking at things from the other fellow's viewpoint is not easily acquired. All of us like to think that we are reasonable and tolerant, but, in truth we are inclined to be pugnacious, and, in practice we lean toward fighting things out rather than reasoning them out.

In the comparatively short time since the inception of the present industrial age, there have been mighty conflicts between management and workers, and in most cases, reasoning was not indulged in until both sides had struggled to a point where physical or financial exhaustion made a compromise essential. The possibility that a way has been found to obviate this apparently natural antagonism is the reason for the widespread interest in the plan that has produced industrial peace in the meat-packing industry for six years past, and which promises to continue such peace in the years to come.

Before recounting our experiences with employee representation, let me describe the kind of soil we tilled and the seeds we planted so that you can evaluate the fruits of our efforts.

Standing as he does between the producer who wants high prices and the consumer who wants low prices, the packer is

compelled to operate on the lowest possible margin, and this affects the amount of money which is available for wages to the employees of the industry. Naturally, packing house employees want the best wages and the packer wants to pay the very maximum because of the quality and the efficiency of well paid labor. The possibilities are determined by laws of economics rather than by the views of the employers, for obviously when the packers cannot control the prices at which they buy livestock and cannot control prices at which they sell meat, they must make their operating margin cover their needs, rather than make their needs determine their margin. As a general proposition, wages in the packing industry have always approximated the wages paid for similar kinds of labor throughout other leading industries. It is difficult to compare work in the packing plants with work elsewhere. More or less skill is necessary, but, in a large plant it is the kind of skill which can be acquired in a comparatively short time. In certain operations the nature of the work is not particularly appealing, despite its essentiality. Even so, the industry attracts and holds an ample labor force at all times.

The packing industry has seen a most interesting procession of nationalities. In the early days, the employees were largely Irish, German and Scotch. Many of them belonged to an organization known as the Knights of Labor, which precipitated and was disrupted by a strike in 1886. After the settlement of this strike people of Polish extraction came into the industry in great numbers, and a few years later there was an influx of Bohemians. Another big strike took place in 1894, and with its settlement came another change in the nationality of packing-house employees. This time, Russia and southeastern Europe provided the workers. Many of them could not speak English; few of them were familiar with American customs. They were easily misled, misdirected and exploited by self-appointed leaders, and the early part of the twentieth century saw many disputes and much disagreement. Relations between the packers and their employees were anything but satisfactory.

This was the situation which prevailed when we entered the great war. The American meat packers were a much bigger factor in the winning of that war than most people realize.

You will remember that the slogan of the day was "Food will win the war". Food in itself could not have won the war without proper and adequate distribution, and it was the meat packers on whom the government had to depend for distribution. The industry knew how to process meats and had the equipment necessary for getting it to the places where it was needed. A constant supply of fresh and wholesome meat for the armies in France was as important as supplies of ammunition—and more difficult to deliver, because meat is perishable.

Under these circumstances, it was imperative that steps be taken to prevent any labor difficulties which might have interfered with the regular movement of meat supplies, and thus it came about that the government appointed an official mediator in the person of Federal Judge Samuel Alschuler, who was charged with arbitrating any grievances having to do with wages and working conditions which might arise in the industry. Judge Alschuler served in that capacity until the war was over, and although the war ended in 1918, he continued to serve until the fall of 1921.

With the end of federal mediation and arbitration in sight, Armour and Company took up this labor problem as it had never been taken up before, and with the employees worked out the details of a plan designed to aid in solving the age-old differences between employee and employer. It is this plan and the manner in which it has worked for some six years which I am to discuss.

The first move in the development of our plan was to ask the hourly paid employees to elect from among their own number representatives to sit in conference with the management. This group then studied various forms of machinery and plans used by other employers or industries, and after a week of constant sessions they jointly prepared the plan and drew up the constitution under which we are still working. It was not a plan drawn up by the management and handed to the employees to take it or leave it. Our plan represented at the time it was prepared and it still represents the joint thought and conclusions of both employees and management.

I will sketch very briefly the outstanding features of the plan which they adopted and which we now know as the Armour Employees' Representation Plan. The purposes of

the plan are stated as follows: to give the employees of the company a voice in regard to the conditions under which they labor, and to provide an orderly and expeditious procedure for the prevention and adjustment of any future differences, and to aid in the development of all matters of mutual benefit to the employees and the company.

Divisional Committees and Conference Boards are composed of equal numbers of representatives of the employees and of the management; the employee representatives are elected directly by the employees, by secret ballot, whereas the management representatives are appointed by the management—both at all times are to have equal voice and voting power in the consideration of matters coming before them. Divisional Committees have original jurisdiction in their respective divisions, namely, the beef divison, pork division, production division and mechanical division. The Conference Board has general jurisdiction over the plant as a whole and is the appeal body from the Divisional Committees. On this board there is one employee representative for each two hundred employees in the smaller plants, and each three hundred employees in the larger ones.

Representatives of the employees must be actual employees of the company in that division of the business from which they are elected, and all hourly paid employees twenty-one years of age and over who are citizens of the United States and in the service of Armour and Company continuously for one year, are eligible to hold office. All hourly paid employees over eighteen years of age, both men and women, are entitled to vote, by secret ballot, provided they have been in the service of the company for thirty days immediately prior to election. The terms of office of employee representatives is one year. If the service of any employee representative becomes unsatisfactory to the employees of the precinct or division from which he was elected, they may recall him and elect someone else in his stead.

On all matters of dispute the employees are required to vote as a unit in accord with the wishes of the majority, and the management representatives likewise must vote as a unit. If it should become evident that employees and management cannot agree on a decision in any matter, provision for abitra-

tion is made. This provision for arbitration is a backstop which absolutely insures the satisfactory adjustment of any problem. It is an evidence of the good faith of both the employees and the company and is a provision which we feel is necessary in any plan which really is what it claims to be.

These are but the highlights of the plan which goes into considerable detail in specifying the ways and means for meeting and solving disputes that might arise.

Any employee desiring to bring any matter before his Divisional Committee or the Conference Board may present it to the employment superintendent either in person or through his representative. If the matter cannot be adjusted by the parties directly concerned — usually the superintendent and the employee — it then goes to the Divisional Committee, and if this Divisional Committee cannot solve it, the plant Conference Board takes action. Matters of general or inter-plant interest go to the General Conference Board which meets on call in Chicago and which is, in effect, the Supreme Court of the Conference Board Plan.

The first meeting of the General Conference Board was one long to be remembered. This meeting was called to ratify the plan and arrange for its adoption in all the Armour plants. For the first time in the company's history, duly elected leaders of the plant workers sat opposite the management representatives at the same conference table. It was a new experience for both of them and they were nervous and skittish. They did not as yet know each other. They had not yet learned from experience that the best way to iron out grievances is to bring them out into the open for airing.

The Conference Board was cosmopolitan, particularly the employee representatives. Among them were common laborers and skilled mechanics, men with college educations and men with no schooling, white men and black men, white collars and overalls. In one respect, however, they were alike; they were men of intelligence and fair minds. They realized that if their conference was successful they would bring about a new relationship between employee and employer, and that they were charged with a heavy responsibility. They labored earnestly and diligently over the preliminary constitution and finally adopted the rules and regulations of the Conference Plan. These were later ratified by the employees.

The official announcement of the plan carried with it a letter from the late J. Ogden Armour, then President of Armour and Company, addressed to the plant worker. In this letter Mr. Armour said:

> World events of the past few years demonstrated as never before that cooperation is one of the greatest factors in adjusting anything worth while. The meat packing industry has reached the point where there must be greater cooperation between employers and employees.
>
> The directors of the Company have decided to establish a medium whereby matters of mutual interest to the employees and the Company may be discussed and adjusted. To properly exercise this function the employees must learn and recognize the responsibility that the business has to the public and its limitations in the matter of providing for the needs of both its owners and workers. The success of business is measured by its returns to owners and employees and by its service to the public. No business can be successful which does not serve all three. Disagreement means business failure; no dividends for the owners; no wages for the workers; no service for the public.
>
> With a view of making real cooperation possible, representatives of the employees and representatives of the management have agreed upon the plan which is outlined in this accompanying constitution. In this, means have been provided for the prompt and orderly consideration of all matters of mutual interest such as wages, hours of labor, working conditions, sanitary and safety measures, etc.
>
> Any employee who may be selected to serve in any capacity in connection with the operation of this plan, shall be wholly free in the performance of his duty as such and he shall not be discriminated against on account of any action taken by him in good faith in his representative capacity. The Superintendent of the Plant and the General Superintendent have been designated to see that this provision is carried out.
>
> It is my firm belief that the cooperation which this plan makes possible will be of mutual advantage to employee, to employer and to the people whom we both serve.

This expressed the policy of the company in presenting the plan. Unfortunately, very soon after its adoption the Conference Board considered and agreed to a wage decrease. They agreed to it just as reluctantly as you or I would, with all the regret and dislike that such an action arouses in a normal human being. But they were convinced that it was necessary; that the business had retrenched in every other possible direction first, and the reduction of wages was only asked as a final measure after every other effort to reduce costs had

failed to accomplish its purpose. Of course, this action made the plan a target for certain leaders who had been more or less recognized as spokesmen for the packing house employees during the time of federal labor control, even though they were not actively engaged in the packing industry. These leaders called a strike in protest against the wage cut and some of the packing house employees responded, with the result that for a few days the operations of the plants were hindered. Just to indicate the response which the strike call received from the rank and file of our workers, I will cite the situation at Chicago. Out of a total working force of 10,523 people, there were absent from work on the morning of the strike just 352. The normal number of absentees runs about 1½ per cent, so you can readily see that a great majority of the employees stuck by the Conference Board. The strike was of short duration.

It was recognized, however, that the success which attended reduction of wages through the action of the Conference Board was not the acid test. The Board had to demonstrate its ability and power to raise as well as to lower wages, and it had its opportunity in the course of the next year. When conditions seemed to warrant it, the employee representatives on the Conference Board requested a wage increase, whereupon the Board directed a survey of wages and conditions of work in comparable industries, to determine the true facts in these respects.

The survey was made by joint committees of employee representatives and management representatives. These men were given time off from their labors and furnished credentials which gave them entrée at such plants as they cared to visit. When they finished their survey, they recommended an increase of approximately 10 per cent and the Board adopted the recommendation and passed it on to the company executives, who made it effective.

Since that time, a survey of wage and working conditions in the vicinity of the large plants is a regular event each spring, and it is worth noting that on at least two occasions the employee representatives themselves declined to support a wage-increase request after their survey, without the matter coming to the formal attention of the Board.

Conditions over which the packing industry has no control complicate our labor situation and prevent steady and even employment. This is particularly true in the departments where killing is done and in those departments which handle the immediate output of the killing departments. Livestock comes to market at times without rhyme or reason. Some ten million farmers and livestock raisers ship when they see fit, and, as a result there are days when there are a great many more meat animals than the packing plants can handle, and other days when there are fewer than the packing plants require. This uneven receipt of raw material constitutes one of the big problems of the meat packers and tends to bring about irregular working conditions, which alternate lay-offs and overtime.

The Armour Conference Board has approved a plan which guarantees the workers pay for forty hours weekly. This is equivalent to five eight-hour days. An actual eight-hour day is practically an impossibility so far as the meat packing industry is concerned. In theory we have what amounts to a nine-hour basic day, and prohibitive overtime rates are so arranged that they permit the handling of heavy receipts, but with burdensome penalties. Every effort is made to provide at least forty hours of work each week, but the impossibility of so doing is evidenced by the fact that Armour and Company find it necessary to pay from three hundred thousand to five hundred thousand dollars per year to employees in the way of guarantees and excess pay for overtime.

After these big and absorbing problems had been settled to the satisfaction of employees and management, the Conference Boards gave attention to other matters and led the way in constructive effort along lines of interest to both the employees and the management. One of the greatest achievements of the Conference Board was in securing for the employees the privilege of acquiring ownership of stock in the company. As the result of a campaign directed by the Board, approximately 100,000 shares of stock, representing a par value of ten million dollars, were sold to employees in the plants. These employees are drawing dividends on that stock at the rate of about $700,000 annually, and those who are closest to the situation predict that employees will purchase stock in ever increasing

amounts as the years go on and will in time own a very large share of the business which employs them. It is interesting to contrast this method of acquiring control of business with the methods advocated by certain radicals in foreign countries.

Another accomplishment of the Conference Board lies in the introduction of group life and health insurance, as a protection for plant employees. At the request of the Board, Armour and Company purchased a blanket policy with a great insurance company, providing $1000.00 life insurance for male employees and $750.00 for women employees. Each policy covers death from any cause and pays to the beneficiaries the face value of the policy. In case of total permanent disability, the full face value of the policy is paid to the employee in monthly installments while he is living. In case of sickness or non-occupational accident — the health-insurance policy provides for payments of $10.00 a week to men employees and $7.50 a week to women employees, up to a total of thirteen weeks, and provides in addition free services of visiting nurses. For this protection, male employees pay at the rate of 35 cents a week, and women employees at the rate of 25 cents a week. Armour and Company pay the balance of the net cost as well as all the expense of administration.

The Conference Board secured another substantial advantage for the people they represent — that of vacations with pay for plant workers who are on an hourly basis. In the past, vacations with pay were exclusively the heritage of salaried workers. Now, the hourly workers who have been in the employ of the company for five years are entitled to one week's vacation with pay, and those who complete fifteen years of service receive two weeks' vacation with full pay.

Constructive work has been done by the Conference Board along lines of accident prevention and the reduction of waste. Both of these are primarily caused by carelessness or thoughtlessness, and the Conference Board has promoted campaigns aimed to keep the minds of the workers on the alert. As a result, a very considerable reduction in the number and severity of accidents has been made, and we have noticed also a reduction in the losses occasioned by spoilage of product and supplies through careless handling.

The Conference Board has proved a medium for the de-

velopment of men. Employee Representatives on the Conference Boards have to win their places in elections. That requires them to demonstrate leadership abilities and to exercise and develop their abilities afterwards, for unless they give satisfaction to their constituents they are subject to recall.

Many of the representatives have impressed the management with their fitness for bigger jobs and promotions have resulted. Management representatives, too, have been broadened and developed by reason of the conferences that are an integral part of the plan. Nearly every plant superintendent agrees that employee representation has made supervision easier. Petty grievances which formerly occupied a considerable part of the superintendent's time are ironed out at their inception and without stoppage of work. The working force itself has greater stability than before, for jobs with Armour and Company now appeal to people who desire assurance of a square deal and of their day in court; with the special advantages secured by the Conference Board, the job becomes quite attractive.

Primarily, the employee representation plan was designed to solve the problems incidental to wages and working conditions, but with these adjusted and with the machinery existing for meeting new problems as they arise, the Conference Boards are able to give more and more of their time to constructive effort along less controversial but nevertheless highly important lines. In the six years during which we have enjoyed employee representation in our plants, we have come to believe that it is thoroughly practical and thoroughly satisfactory, both to employees and employers. Started as an experiment, it has demonstrated its practicability, and there is greater cooperation and better feeling today between the management of Armour and Company and the workers than has ever been the case before.

UNION-MANAGEMENT COOPERATION IN THE RAILROAD INDUSTRY

OTTO S. BEYER, JR.
Consulting Engineer for the Standard Railroad Unions, Washington, D. C.

DESPITE the somewhat, gloomy picture my friend Dr. Leiserson[1] has painted concerning the present status of the organized labor movement, I wish to submit that, in the words of Lady Peele, "There is lots of life in the old girl yet". It is my task to describe the program of cooperation between unions and management in the railroad industry — an industry which I am glad to say Dr. Leiserson omitted from his list of industries in which the organized labor movement is not functioning effectively.

It should be pointed out in the beginning that the policy of cooperation between unions and managements in the railroad industry has not been designed merely for the purpose of settling grievances, in other words, adjusting the conventional differences which have troubled the relationships between men and management in the past. It is a program which is designed to further the major purposes of the industry, namely, service to society.

The cooperative movement in the railroad industry dates back to the period shortly after the war. At that time, and in recognition of the policy adopted by the Federal Railroad Administration, namely, that workers were not to be discriminated against for membership or non-membership in unions, the railroad unions conceived the idea that, as long as this matter of controversy was out of the way, they could rightly and properly offer their services to the management for the purpose of furthering the objects of the railroad industry. They drew up a program which was submitted to the Director General of Railroads. After the program was submitted, the railroads were returned to their private owners and then the period of liquidation set in, with the result that no practical

[1] *Cf. supra*, pp. 96-109.

progress could be made toward the establishment of a constructive relationship between the railroad unions concerned and the managements. The unions, nevertheless, insisted upon keeping the idea alive. When later the railroads proposed a reduction of wages as the only escape from the predicament that they were in, the unions suggested that the thing to do was for the unions and the managements to get together with a view to seeing what could be done in the way of eliminating the wastes and inefficiencies of the industry. That proposal, however, was not accepted.

Before the final crisis arrived in the post-war railroad labor liquidation, which took the form of the shopmen's strike of 1922, the shop organizations themselves had proposed to several railroad executives that something be done by way of cooperation between these particular unions and the managements. After the shop organizations had made this suggestion to two or three executives, they finally met with the President of the Baltimore and Ohio Railroad, who said that, as far as he was concerned, he would be glad to try out the idea of cooperation.

It so happened, however, that about that time the Railroad Labor Board saw fit to hand down another drastic wage cut affecting particularly the shopmen, with the result that the shop unions went out on strike. As soon as the strike was out of the way, in September 1922, the shop craft unions and the management of the Baltimore and Ohio again got together and decided they would put a cooperative program into practice. A point on the Baltimore and Ohio Railroad was selected, for purposes of demonstration, out in Pittsburgh, where the situation was particularly bad from the point of view of cooperation. The original theory was that the idea of cooperation between unions and management should be tried out in an atmosphere where results might be expected to be reasonably sure. The argument which the railroad company put up was that, "If you can make cooperation go in the Pittsburgh shops, it ought to go anywhere."

It was my particular task to go out to Pittsburgh and try to put the program into practice. I lack the time now to paint a picture of what was found out there. There were racial differences. The local management looked upon the

unions as a sort of necessary evil and believed that the proper policy for the local management to adopt towards a union of its workers and towards the shop committeemen and all of the paraphernalia of organized labor was to keep labor in its place; that by no process should organized labor be given recognition or prestige, and as a consequence anything which arose to divide the men in their attitude, in their policies, in their programs, should not be discouraged by the management.

Moreover, because that particular shop was the least efficient, because the morale was lowest according to all of the tests made by the management in Baltimore, it was shut down first whenever it became necessary to effect economies, with the result that a bad situation was made worse through instability of employment — more so than on other points of the railroad.

I might incidentally observe also that by the same token the management sent the least amount of money there to effect improvements, so that the men had inadequate tools to work with. That situation is more or less characteristic and, I think you will readily agree, more or less natural when you look at it from the point of view of a management which has only so much money available with which to effect improvements.

At all events, what we did when we went out to Pittsburgh under the auspices of the unions was to tell the men what we were driving at and ask for their cooperation. Because of the fact that their union leaders told them that this was an experiment by which they had nothing to lose and certainly a lot to gain, they agreed to cooperate. With that mandate, as well as with a mandate emanating from the higher authorities of the railroad, we went into the shops, sized up the situation, and approached the representatives of the men to make suggestions as to what might be done to ameliorate the situation, to improve the tools, to do all of the different things that were necessary in order to have it appear clearly that something was going on. As an illustration, I might say that a committee of the men (which the men themselves selected) met with the management and agreed that certain tools were improper and should be replaced. In other words, the local unions were made parties to a program of improving a bad situation. They were given a constructive part to play in the process.

Another very important thing quickly revealed as a result of our survey was the necessity of giving the men confidence that the cooperative program would not in the long run work the men out of a job. What to do in that respect was the question. It so happened that the railroad company had a great many locomotives which it had been in the habit, owing to lack of facilities and because of high cost, of turning over to private concerns for rebuilding. They decided that, in the interest of making this thing go and furnishing the men a practical example of what getting together would mean, they would send some of these locomotives to Pittsburgh rather than elsewhere for rebuilding, and that was done. So we had a sort of a practical object lesson for the benefit of the rank and file.

As this process of rehabilitation went on, it was revealed that the union committeemen, whose only function inside of the plant had been to call to the attention of the management the little grievances of individuals, became a part of the plant administration; they were accepted in a sense as equivalent to the supervision. They began to discharge constructive as well as protective functions.

Dr. Leiserson referred to the necessity of bringing men and management together again through some sort of employee representation plan. How to do that on a large scale is very difficult to imagine if we simply try to conceive of it in terms of calling one another friendly names. What the Baltimore and Ohio experiment revealed was that the way to realize this hope is to bring the management together, from time to time, with the union representatives of the men, the committeemen whom the men select themselves through their voluntary agencies. These agencies, local unions, when they meet at night and at other times, determine what it is that the men think should be rectified or improved and call those things to the attention of the committeemen, and the committeemen in turn call these matters to the attention of the management.

In keeping with this theory, at all events, it developed that it was quite feasible to have the committeemen also meet the management to discuss what might be done on the part of the management to help the men, and what might be done by the men also to help the management. There are, in every in-

dustrial plant, innumerable little inefficiencies which men detect by the wholesale but which are ordinarily lost sight of, simply because the men in the ordinary scheme of things do not feel impelled to call them to the attention of the management. That was done. In addition, minutes were kept.

On the basis of this one local experiment conducted under union auspices in Pittsburgh, the cooperative proposition was next discussed in Cincinnati, when the men from the different unions on the Baltimore and Ohio met in convention. By that time it became clear what the practical objectives of a cooperative program between the men and the management might be. The attention of the men was called to the fact that stability of employment could be attained, provided the men and the management did get together. This appealed to the men from the other points of the railroad, so that they eventually passed a resolution requesting that the program be extended to all of the shops on the Baltimore and Ohio. Subsequently the system representatives of the men met with the management in Baltimore, drew up a memorandum agreement extending the program to all of the shops on the system and incorporated in the agreement several principles which are of great significance from the point of view of the technique of practical cooperation between men organized into bona-fide unions and management.

The first principle which was recognized as being desirable was that in any program of cooperation, in any program seeking to enlist the support and enthusiasm of the men in the direction of improved production, service and the like, obviously the men must share. Otherwise what incentive is there for them to participate in such a program? In addition, it was also agreed in the memorandum of understanding that a record should be kept of what the subjects were that were discussed locally; what propositions were brought to the attention of the management; how they were acted upon and disposed of. Finally, it was also agreed that periodically, about every three months, the system representatives of the men would get together and review the performance of each point, and discuss with the management programs affecting the interests of the men as a whole all over the system. This program was put into effect in March, 1924, and it has been going steadily ever since.

Simply by way of illustration of the vitality of this situation, I would like to submit these figures: that from the day of the inception of the program to date about 20,000 propositions have been called to the attention of the management by the men through their local committees, their unions and otherwise, and have been discussed with the management, and agreed to as being practical and worthy of being put into effect. They involve every conceivable detail affecting railroad operation — design, the elimination of waste, securing business, saving material, quality of work, employee training, etc. In other words, the unions, as I pointed out a while ago, play a constructive part in running the Baltimore and Ohio railroad. The men locally, through their unions, feel that they have a new part to play; their committeemen are no longer simply a sort of necessary evil around the plant; they are not regarded as more or less undesirable individuals; but they help the management; they bring to the management's attention things which otherwise would utterly escape attention.

From the Baltimore and Ohio the cooperative program has been extended to the Canadian National, by these same unions, the so-called A. F. of L. Shop Craft Unions — the machinists, the boiler-makers, electrical workers and sheet-metal workers — unions that function in the building-trades field just the same as they function in the railroad field. In addition to the Shop Craft Unions, the Brotherhood of Maintenance of Way Employees has taken up the program and is now introducing it in the Maintenance of Way Service of the Canadian National, as an example of what can be accomplished in this important department of the railroad industry.

All in all, there are to date, approximately 75,000 to 80,000 railroad workers actively engaged in a program of intensive practical cooperation with management in the railroad industry. The Railroad Employees Department of the American Federation of Labor has gotten out a pamphlet which is entitled *The Cooperative Policy of the Railway Employees Department of the American Federation of Labor.*

This particular development or policy has demonstrated the following principles as being essential to a sound program of cooperation in industry:

(1) "Full and cordial recognition of the standard railroad

unions as the properly accredited organizations of the employees." In other words, there can be no question, or there should be no question, as to the right of the individual to join any organization he desires. Freedom of association must be conceded.

(2) "Acceptance by managements of the standard unions as helpful, necessary and constructive in the conduct of the railroad industry." In other words, after the union has once organized, it must not, if its cooperation is desired, be regarded as a sort of necessary evil. It must be looked upon as a constructive, necessary and desirable part of the industry. That must be the ideal, the responsibility that is conceded to it, if you please, by the management.

(3) "Development between unions and managements of written agreements governing wages, working conditions and the prompt and orderly adjustment of disputes." I emphasize the latter particularly because it has been found, as a result of our experience with cooperation, that we cannot permit disagreements which arise from time to time to remain unadjusted. We must devise machinery for the prompt and orderly adjustment of these differences. How to do that of course is another detail of technique which we could discuss at length.

(4) "Systematic cooperation between unions and managements for improved railroad service, increased efficiency, and the elimination of waste." In other words, a cooperative movement cannot degenerate, or must not be permitted to degenerate, into a sort of conspiracy between the workers in an industry and the management with the end in view of exploiting the public. Its objective, from the public point of view, must be improved service. Unless it works out that way eventually, it will collapse; and that it does work out that way I think will be pretty well conceded by anybody who will take the trouble to travel on any of these railroads where there is no fundamental dispute or issue between the employees and the management.

(5) "Willingness on the part of managements to help the standard unions solve some of their problems in return for the constructive help rendered by the unions in the solution of some of managements' problems." It has got to be a mutual proposition.

(6) "Stabilization of employment." The conscience of the management must be thoroughly aroused in respect, first and foremost, to its obligation to try and keep the workers steadily employed. Otherwise nobody is going to be enthusiastic long about the idea of working to improve the conduct of the industry by saving, eliminating waste, increasing production, if it is going to mean his job in the very last analysis. Fortunately, in the railroad industry there is much that can be done. In other words, railroad managements can study the problem of employment and make as much progress in the solution of that problem as in the solution of many other problems that have confronted, and do confront, railroad managements from time to time.

(7) "Measuring and sharing the gains of cooperation." It is necessary to have some idea as to what is being accomplished in order that we may know, from time to time, when to properly adjust and improve working conditions, and share the savings affected.

(8) "Provision of definite joint union-management machinery to promote and maintain cooperative effort." In order to put these principles into practice we are using the machinery that I have sketched and we are gradually developing it through a process of experimentation on the Baltimore and Ohio, Canadian National, and elsewhere. The machinery of cooperation is as essential as the desire for cooperation.

THE TRADE-UNION ATTITUDE TOWARD FACT-FINDING BODIES

K. C. ADAMS
Director of Research, United Mine Workers of America

TRADE unionism is an integral part of the existing system of industry first called by its critics "capitalism". The word, once used in reproach, has in these times been adopted with pride by the advocates and defenders of the system, as was the case in regard to great religious sects and political parties which adopted as badges of honor the names first hurled at them as epithets.

Distrust and hostility toward the business system wane as it is becoming better understood how the general prosperity and individual and family welfare of modern peoples has been increased by the use of capital in production to multiply the productive power of man's labor, whether of hand or of brain. The trade union is a phenomenon of capitalism similar to the corporation. One is essentially a pooling of labor for purposes of common action in production and sales; the other is a pooling of capital for exactly the same purposes. The economic aims of both are identical — gain.

The strange survival of pre-capitalist mentality that makes so many persons subconsciously resent high wages for workingmen, or action by workingmen to better their condition, while lauding exactly similar efforts by capital to get more profits and avoid losses, is back of demands that labor act upon other motives than are expected of capital and voluntarily sacrifice its wages to increase the profits of others. It is the feudal mind speaking in a capitalist age.

In insisting on the maintenance of American wage standards in industry, trade unions are doing their part, probably more than their part, to force the corporations of the country to conduct business along scientific and efficient lines.

Nothing is more significant of the revolution in economic thinking and methods of study that has followed the swing of economic thought toward the study of the science from the

consumption standpoint, and from the accumulation of accurate statistical measurements of the national income and consumption of goods, than the changed attitude on the wage question. That the purchasing power of the American masses is the pivot upon which our whole economic system turns, and that a reduction in that purchasing power is instantly registered, not only in the distress of the masses but in the shrinkage of profits and the destruction of capital values, has become so evident in the post-war period that it is becoming quite difficult to find advocates of low-wage theories (excepting, of course, in the disorganized industry of coal) formerly so popular among financiers and industrial management.

Certainly no one will charge that a desire to promote a theoretical socialized industry is behind the thought of John J. Raskob, when he declares that "the time is coming when every workingman will have two holidays each week." Nor is Samuel Vauclain branded a socialist when he enunciates the sound doctrine that "wages must not be governed simply by the supply of labor with relation to the demand for workmen." These declarations by leaders of American business rather suggest the soundness of the doctrine of Owen Young, when he avers that "we should investigate the losers" who lack the intelligence and practicality to keep pace with American progress, but who insist on holding up the parade by continuing primitive managements.

Plainly, then, fact-finding is essential to the end that incompetents be weeded out and relegated to less dominating positions in the great scheme of American enterprise. Since labor has accepted capitalism, the big job of trade unions becomes that of forcing business men to behave like capitalists. Obviously, then, labor must be equipped at all times to prove the causes and effects of backward management, and, what is more, make its own full contribution toward the accomplishment of greater efficiency. Statistical structures behind which incompetent employers can hide, continuing obsolete methods and postponing progress, are just as harmful to the common welfare as the single-platitude office-seeker. The trade union viewpoint is that "fact-finding" should be concise, simplified, and yet demonstrate the road to achievement as completely as analysis of any given industry will permit.

In an industry insulated like coal mining, fact-finding and human liberty to pursue the facts in seeking betterments may be regarded as the first essential in promoting and permanently safeguarding industrial peace. The mere gathering and printing of voluminous information without identification, interpretation or recommendation will never solve a single problem of the industry.

The world believes, and most Americans are sure, that we in this country have accepted and adopted mechanized production methods wherever possible. Even the tabloid readers know this much. Almost everyone is also aware of the insistence of coal operators on reducing mine wages in the union coal fields. Indiana and Illinois are the two largest union coal-producing states. Labor costs in mechanized producing mines in these states range from $1.00 to $1.25 the ton. Reliable engineers insist that the great majority of the remaining hand-loading mines can be so transformed by mechanized operation as to pay all interest charges on the investment, taxes, depreciation and depletion, and yet load coal into the railroad cars for $1.15 the ton, based upon present wage rates of $6.00 to $10.00 the day. Yet the operators in Indiana and Illinois insist on reducing wages to meet the competition of Western Kentucky on a mine run basis of $1.35 f.o.b. mines, with an existing freight rate differential in favor of Indiana and Illinois of thirty cents the ton. This demand represents the sort of laggardness on the part of mine management to which the leadership of the Miners' Union replies that the American coal miner will "take no backward step."

The crying need of the coal industry is leadership that will gear itself to American thought and embrace a practical scientific program—leadership that will face the facts, undertake progressive betterments and put to rout the section-hand mentality which has shackled coal production and distribution to the antiquated methods of daddyism. Fact-finding without some force to revamp the industry on constructive lines will avail nothing.

Such, at least, has been the experience of the United Mine Workers of America, which, as the party of the second part to the production of coal in these United States, has probably experienced more fact-finding bodies than any other trade

union. Within eight years two Government Coal Commissions have investigated bituminous coal and pronounced it a badly functioning and disorganized industry. Using the basic facts reported by these Commissions and supplemented by direct inquiry, the Institute of Economics, the Russell Sage Foundation and numerous other agencies have publicly declared the bituminous coal industry overdeveloped, mismanaged and tragically uneconomic in its operation. Long before these official bodies and independent agencies penetrated bituminous coal, the United Mine Workers of America knew as much.

Prior to the advent of the War, the United Mine Workers of America solicited the Government, on various occasions, to investigate the lack of organization and resulting deplorable economic conditions within the coal industry. The union has always believed that, once the American people fully comprehended the uneconomic evils within the coal industry, public opinion would force a correlation of effort between the various coal-producing states and the Federal Government that would put the vital, basic industry of coal on a parity with the railroads and public utilities. Union leaders think that the public interest demands such a relationship, since coal constitutes the chief factor outside of labor costs in our transportation systems. Another factor is that of the conservation of human life. Under federal regulation it would be possible to standardize safety measures and require certificates of competency for employment within the mines. And still of vital public importance is the matter of conserving high-grade coal deposits for the uses to which they are specifically adapted and, as a further protection, imposing mining conditions which will insure the greatest percentage of recovery. This program of intelligent conduct of the coal industry advocated by the United Mine Workers is, of course, predicated upon the miner's finding his just economic level in the relationship of American enterprise and progressively advancing along with the rest of American civilization to higher standards in both workshop and home.

During the past ten years consumption of bituminous coal has remained stationary, averaging 486,000,000 tons per year. The standstill of coal despite the great progress of all other

American industries has resulted from the development of greater fuel efficiency by the railroads and commercial users. methods which are coming into common usage. Looking twenty-five years in advance, one sees little hope that bituminous consumption will increase. As an example, in 1920 the railroads used 170 pounds of coal to move 1,000 tons of freight a car-mile; in 1925 the average was 140 pounds. The Delaware and Hudson has recently installed two railroad locomotives for which it is claimed that only 55 pounds of coal are required to move 1,000 tons of freight a car-mile. Only half the coal was required in 1927 to produce a kilowatt-hour as compared with 1919. Thus it is plainly evident that in the case of the coal, unlike other commodities, consumption cannot be increased through high-powered educational advertising campaigns. Coal as a selling proposition is the one commodity the "go-getter" does not include in his bag of merchandising tricks.

The present status of bituminous coal is that of bankrupt companies and impoverished workmen. Six thousand coal companies are engaged in a ruthless competitive warfare, selling capital assets and labor on the auction block to four thousand five hundred organized purchasing agents.

Hoping to avert what is now taking place, government agencies sponsored a long-time wage agreement, and, at the government's solicitation, the miners and operators negotiated a three-year wage pact, April 1st, 1924, in Jacksonville, Florida, which simply continued in effect the wage rates and working conditions which were handed down in the award of the Bituminous Coal Commission, appointed by President Wilson in 1920.

The following table gives a clear statistical picture of the over-development in bituminous coal mining in seven states. The seven states listed below produced 84.4 per cent of the total production of 483,687,000 tons in all states during 1924. Some 1250 mines, representing 22.0 per cent of the 5,693 reporting mines in the seven states, produced 76 per cent of the production of these states and 64 per cent of the production of mines in all states. The total number of bituminous mines reporting to the U. S. Geological Survey in 1924, for all states, was 7,586.

BITUMINOUS COAL PRODUCTION, 1924

State	Number of Mines Producing 100,000 Tons	Total Tonnage Mines Producing 100,000 Tons	Per cent of Total Tonnage of State	Total Production for Entire State
Illinois	165	61,294,279	89.8	68,323,281
Indiana	70	16,889,145	78.6	21,480,213
Ohio	99	20,975,628	68.8	30,473,007
Pennsylvania	377	97,890,294	75.	130,633,773
Kentucky (East)	130	25,215,778	55.9	45,147,204
Kentucky (West)	33	5,431,938	12.	
Virginia	28	8,269,241	77.4	10,693,464
West Virginia	348	73,531,402	72.3	101,662,897
Totals	1250	309,497,705		408,413,839

The most untrained, unimaginative and unconcerned of our business men can readily discern from this statistical picture that unrestrained competition means destruction of the capital assets of the coal companies, as well as the degradation and enslaving of the coal miners.

West Virginia operators for the most part, and Kentucky operators as a whole, refused to yield to the government's solicitation; they were unwilling to be bound by a wage scale that would stabilize the cost of production, eliminate high-cost uneconomic mines, and retain for American coal miners American wage standards. Coal miners were brow-beaten and intimidated by means of injunctions and by eviction from their company-owned homes. Eventually the miners were forced to accept wage reductions in West Virginia and Kentucky. As forecasted by the union leaders, wage-slashing is bottomless when competition rests in the hands of men determined to continue operation regardless of the levels to which wages are forced to drop. From $7.50 a day, wages in West Virginia and Kentucky have been reduced to as low as $2.00, with less than half-time employment, while the work day has increased in many instances from eight to ten hours.

The effect of coolie-izing American labor in Kentucky, West Virginia and Virginia has been to increase the tonnage sold below and around production cost to displace northern field coal. This policy has spread bankruptcy to all lines of busi-

ness in the mining regions of these states. Here is the story of coal produced and sales realizations:

In 1923 Kentucky produced 44,777,000 tons of coal, for which Kentucky operators received $113,735,000. In 1926 Kentucky produced 66,330,000 tons of coal, for which Kentucky operators received $110,194,000. Production was increased 21,553,000 tons, or 48 per cent, while sales realization decreased $3,541,000, or 3 per cent.

Virginia in 1923, produced 11,761,000 tons of coal, for which Virginia operators received $32,460,000. In 1926 Virginia produced 14,493,000 tons of coal, for which Virginia operators received $24,827,000. Production increased 2,731,000 tons, or 23 per cent, while sales realization decreased $7,633,000, or 24 per cent.

In 1923 West Virginia produced 107,899,000 tons of coal, for which West Virginia operators received $285,934,000. In 1926 West Virginia produced 147,209,000 tons of coal, for which West Virginia operators received $270,864,000. Production increased 39,310,000 tons, or 36 per cent, while sales realization decreased $15,070,000, or 5 per cent.

The effort of West Virginia, Kentucky and Virginia operators to extend sales, on the basis of price only, in the competitive markets geographically linked to the northern coal fields, resulted in wholesale repudiations of large wage contracts by what had been regarded as strong and reputable coal companies. Thus external competition added to the internal competition within the northern coal states is responsible for the present-day demands of union operators for wholesale wage reductions in the long-established union areas.

In fighting these demands for a wage reduction, the Mine Workers' Union is endeavoring to prove that unjustified wage slashing, a sort of deflation that deflates nothing but wages, is not the panacea to correct the ills of the bituminous coal industry. Fighting with all their economic force to preserve American wages for the men who mine the coal, the United Mine Workers have carried the cause of the American coal miners to the United States Senate for investigation. The Interstate Commerce Committee of the Senate is now holding sessions developing the facts of ruthless competition, with the hope that some form of legislation may be enacted to stabilize

the industry. In the bill of complaint upon which this senatorial action was brought about, the Mine Workers charge certain railroads with being parties to a conspiracy to deunionize the coal mines for a twofold purpose: (1) to secure cheaper railway fuel; (2) to reduce the mine workers' wage so that it could not be used as a yardstick measurement by which maintenance men and other railway employees can make comparison in seeking wage advances. Testimony before the Senate Committee has already sustained the Mine Workers' charge against the railroads. Evidence supplied in the testimony of coal operators reveals that northern railroads have transferred large tonnage requirements to southern coal fields where wages have been depressed, despite the fact that increased freight costs in some instances do not reduce the delivered price of the coal.

The transfer of railway fuel was an invitation to the northern field operators to depress prices below production costs. Lacking leadership, and with no organization to fight back, northern field operators responded to the railroads' invitation by reducing coal prices, regardless of production costs. The disastrous results of such competition may be illustrated by the following table of coal prices received from the railroads by the Pittsburgh Coal Company, which company assumed the lead in repudiating its labor contract. These figures were submitted by W. G. Warden, Chairman of the Board.

COAL PRICES RECEIVED BY PITTSBURGH COAL COMPANY

Year	From B. & O. RR.	From Erie RR.	From N. Y. C. RR.	From P. & L. E. RR.	From Penn. RR.	From Montour RR.
1923	$2.96	$2.64	$2.82	$2.81	$2.73	$2.83
1924	2.58	2.48	2.35	2.34	2.64	2.56
1925	2.38	2.35	2.22	2.13	2.00	2.51
1926	2.75	2.26	2.15	2.06	1.88	2.38
1927	2.20	2.10	2.13	2.02	1.90	2.29
Decrease in cents per ton from 1923 to 1927	.76	.54	.69	.79	.83	.54

The present railroad freight rates were predicated on coal prices ranging from $2.25 to $2.50 the ton. The attempt of the Pittsburgh Coal Company to deunionize its mines and reduce coal production costs and sales prices has cost that company approximately $12,000,000 in actual losses in less than three years.

The story of railroad success at the expense of coal company capital, mine workers' wages and commercial consumers can be found in figures submitted by the Pennsylvania Coal and Coke Corporation, which show that for the years 1923 to 1927 inclusive the railroads bought coal from 13 to 51 cents the ton cheaper than the commercial users:

PRICES RECEIVED BY PENNSYLVANIA COAL AND COKE CORPORATION

Year	Pennsylvania Railroad	New York Central Railroad	Average Realization All Coal Sold
1923	$2.85	$2.72	$3.36
1924	2.19	2.25	2.48
1925	1.85	2.03	2.24
1926	2.01	2.06	2.30
1927	2.14	2.06	2.27
Decrease in cents per ton between 1923 and 1927	.71	.66	

To show more clearly the success of the railroads in obtaining cheaper coal, the following table, taken from the reports of the Interstate Commerce Commission, detailing comparative coal costs for thirteen Class I railroads for the year 1923 and the month of December, 1927, will show to what extent the railroads, consuming twenty-seven per cent of the total bituminous coal production, are profiting at the expense of the disorganized bituminous coal industry, while the domestic consumer reaps no benefit whatever.

The success of southern operators in breaking down union standards was accomplished through the medium of federal and state injunctions. In West Virginia 316 coal companies, through a single non-resident corporation, have obtained a

COST OF COAL TO RAILROADS

Railroad	Year 1923	December, 1927	Decrease in cost per ton, since 1923
Pennsylvania	$2.77	$1.87	$0.90
New York Central	3.44	2.60	.84
Boston & Albany	5.73	4.42	1.31
Baltimore & Ohio	2.65	1.65	1.00
Pittsburgh & Lake Erie	2.83	1.94	.89
Wheeling & Lake Erie	2.82	1.74	1.08
Illinois Central	3.03	2.24	.79
Louisville & Nashville	2.63	1.86	.77
Virginian Railway Co.	3.00	1.96	1.04
Chesapeake & Ohio	3.13	1.58	1.55
Norfolk & Western	2.69	1.64	1.05
Père Marquette	4.02	3.38	.64
Lehigh Valley	4.64	3.47	1.17

federal injunction that enjoins in perpetuity the United Mine Workers from any activity whatsoever in West Virginia. This decree is based upon the asserted property right of these companies, acquired by yellow-dog contracts, to preserve the non-union status of their workmen.

In Western Pennsylvania, a resident corporation, the Pittsburgh Terminal Coal Company, succeeded in securing a similar injunction, the court holding that the intent to persuade men to cease employment was an interference with interstate commerce.

By resort to injunctions the coal operators have established a judge-made law that the coal business is interstate commerce and the United Mine Workers are now forced to accept this interpretation. In consequence therefore, the United Mine Workers insist that the entire structure of the coal industry be dealt with as a matter of interstate commerce and are now urging the Congress of the United States to legislate to this effect.

1. We ask Congress to prohibit the abuses that have sprung up in the issuance of federal injunctions in labor disputes.

2. We ask that the Interstate Commerce Act be so amended as to prevent the railroads from exploiting the coal industry.

3. We ask for legislation that will enable consolidations in line with the recommendations of the U. S. Coal Commission.

4. We ask for the creation of a Federal Coal Commission

to regulate the industry, with power to license coal-mining operations, to determine and to recommend to the Interstate Commerce Commission scientific freight-rate adjustments, to establish mediation and conciliatory courts, and to protect the public against unfair prices.

The leaders of the miners' union hold that the public welfare demands governmental regulation. The fact that existing laws do not grant authority for governmental regulation is no indicator as to the practicality or desirability of government control. Laws can be passed that will enable sane regulation, eliminate uneconomic mines, restore normal and healthy competitive relations, establish American standards of employment and give to the public fair-priced coal. Primitive management must give way to intelligent direction. Direct examination of the industry has enabled the United Mine Workers to present the case of bituminous coal to the United States Senate. Despite the baseless demand for "less government in business", the union is seeking stabilization through governmental supervision, and this action is positive proof of the value that the United Mine Workers place upon the much neglected and widely misunderstood function of fact-finding.

EMPLOYEE REPRESENTATION PLANS AND LABOR ORGANIZATIONS

DISCUSSION

PROFESSOR HERMAN OLIPHANT (Professor of Law, Columbia University; Assistant Director of Industrial Relations Division of Emergency Fleet Corporation, 1918-19; Associate Counsel for Unions in Interborough Injunction Litigation): One having listened to the first three of the papers dealing with the subject of company unions[1] cannot approach commenting on it without a chastened spirit, in view of the richness of the material which those papers lay before you for consideration.

What does this company union movement mean? One who has worked with and observed labor relations for some time cannot help at times having the feeling, or at least the query, as to whether we may not after all be merely paddling about in large circles. We find, for instance, that the labor movement in this country is today desperately attempting to retain a position which some of us in our thinking some time ago took as a point of departure. Not a few of us, no doubt, have had the feeling for a long time that lying at the very beginnings of any sound and wise solution of our major problems in industrial relations was a set-up which would enable us to deal with labor in groups that extended beyond the individual plant. And yet within a period of a little more than a half-dozen years the company union movement sweeps over the country and we are compelled to pause and seriously to ask ourselves the question: First, in predicting the form which the administration of labor relations is eventually going to take in this country, do we face a choice between organizations of men confined to a single plant or company and inter-company unions? Or does it all mean that the company union movement springs up in response to a need not otherwise being met, and that after all, the company union movement and the inter-company union movement are things which can dwell together in the same house in peace?

[1] For papers by Professor Leiserson, Mr. Ellerd and Mr. Beyer, *cf. supra*, pp. 96, 110, 120.

These questions cut to the root of the problems with which most of us have been wrestling. I am pretty sure that we could all agree on this at least: Only an excess of confidence would cause any of us to say that we now know the answers to these questions. We could probably also agree on this: A potent ally in arriving at an answer is going to be time fraught with experience. Therefore one of the things which the situation requires, in this rivalry between the two forms of labor organization, is a free field for both with no favors for either.

Now, this remark brings me to the excuse if not the justification for a student of law being on the program. The only important legal aspect of the general question of company unions and union-management cooperation is the relation of the anti-union promise, sometimes more dramatically called the "yellow-dog contract," to the whole situation. What about the company union when it is accompanied by an individual promise executed by each workman, obligating him not to join any other form of labor organization?

If the company union which such a promise accompanies (bearing in mind the practical effect of judicial approval and enforcement of such promises or protection of such promises against labor organizers by means of the injunction) is not the result of a bona-fide effort to permit men in the plant to organize in an independent body capable of expressing their opinions and wills, the case against the validity of the anti-union promise, it seems to me, is pretty clear for this reason: so long as the anti-union promise is printed on a piece of paper with the dotted line at the end, and is handed out for the individual workman to sign, he not being fortified in his decison to sign or not to sign by the adjacent strength of his fellow workmen, the net result is a wholly bullet-proof device fatal to all unionization.

A more serious question and one about which we know little, if anything — I have time merely to raise it with you and consign it to your meditation — is this: Supposing that the company union which the "yellow-dog" promise accompanies is an honest effort on the part of management to create an organization independent of management domination, do you have in that situation such a disparity of bargaining power between the employer on the one hand and the group

of workmen limited to his plant, on the other, that the "yellow-dog" promise should not be protected for the purpose that I originally described? In other words, if the promise is protected, can we maintain, during a period of experimentation with these two competing forms of labor organizations, a free field with no favors?

MR. HENRY S. DENNISON (President, Dennison Manufacturing Company, Framingham, Mass.): I will accept very gladly all of the warnings to employers that Dr. Leiserson gives. Like the Armour Company, when we started consideration of employee representation we faced the risks and the possibilities, and in so far as we could, accepted the responsibilities. We had no notion that a movement of this sort, especially under the conditions of the time, could be confined to some comfortable boundaries that should leave us as employers freer than ever to do as we pleased. Once started, the movement might take forms no one could foresee.

I want to echo Dr. Leiserson's criticism of the widespread platitude that this was a scheme to bring about closer personal relations. The people who said that proved that they knew nothing of the inside of factories and workshops. The employee representation plan introduced, rather, extra machinery to make the whole personal relationship even less close than it was, and yet it had other values so important that it was a great shame to blind it by any such misunderstanding.

I want to take issue only with what seems to be a point of view of Dr. Leiserson's. He seems to see employee representation and trade unionism as too much alike, and therefore too much in competition with each other. For example, he limits his survey, his definition of employee representation plans, to those which do not acknowledge the trade union as a legitimate device for representation.

In our own plan, and I think in most that have survived and been at all active, there is specific acknowledgment, to begin with, that trade-union representation is an admissable plan; that if through any conjunction of circumstances employees prefer that sort of representation, it is equally open. The "yellow-dog contract" is, thank God, as yet exceptional. Most of the plans with which I am at all acquainted make an ab-

solutely open place for unions, and many, like our own, have both union and employee representation running along together, each serving their particular functions. Although it is quite impossible in our case, the union representation being so small in a specialized industry like ours, to make a combination of the two, as the Baltimore and Ohio has done, we have still in effect active opportunity for the two, either and both being used as occasion demands.

The foregoing criticism also would cover the point which Dr. Leiserson made and which Mr. Beyer has already answered, that trade-union leaders were asleep when they allowed company unions to be formed. In special cases they undoubtedly were, but as a matter of fact, it insistently seems to me that there are functions that belong to each kind of union. There are places which each can fill. Within any given company there are likely to be places which both can fill, as we found within our own experience.

As I tried to state in a rough way at President Wilson's first industrial conference — which was materially helped in its breakdown by just this misunderstanding of the whole situation — a national association should have the strength to perform a defensive function in preventing aggressive action against the interests of labor on the part of employers; whereas constructive possibilities lay rather in the highly decentralized but defensively much weaker company union or shop committee plan. There is the general line of distinction of function which I suspect will be greatly refined by experience, particularly by such experiences as those of the Baltimore and Ohio, where the difference of function between the union and the shop councils must sooner or later work itself out in rather precise fashion.

It is significant, too, that in this country and in England as well these different forms have developed. They are two quite different countries and have quite different union conditions, and yet there are the shop councils at work on shop problems in England.

There has been nothing said about one field of development which is nevertheless proving in our own experience to be of very great importance. That is the development of the representative back on his working floor and at his job. Wholly

unexpectedly to us, this development has proven to be one of the most valuable results of an employee representative system. We never thought of the representative's personal function, for the first two or three years, but little by little he is cooperating with the foreman on the floor, accomplishing results which no appointee of the company or anybody else could accomplish, acting as a sort of highly functionalized or specialized assistant foreman. As a matter of fact he is filling a place that those of us who have tried to find the basic facts that underlie our organization forms have been interested in for years. We have tried to discover whether there is not some part of a foreman's job that could be better done by an elected man than by a selected man. Obviously, all the technical parts of a foreman's job can be better done by a selected man. We ourselves had set all that possibility aside because we made an analysis and learned that we could not find the separate parts of the job. Then along came the elected man, who has found a variety of different ways of cooperating with and working in partnership with the foreman and has given us results in the fields of management and discipline that were very much higher than we have ever known before.

Dr. Leiserson's allusion to employee representation as a form of democratic control of industry deserves to be analyzed. What do we actually mean by that word "control"? What are the possibilities of control? The world has tried it out a great deal on the employers' side and obviously we are not wholly satisfied or there would not have developed any unions or company unions or representation plans. Control by the employer has left much to be desired. Control by employees frankly considered has offered no more hopeful prospect. Control by balance of power was the old escape. We always thought of capital and labor as being, somehow or other, in a miraculous balance. Well, a balance never controlled much of anything. The balance is a net result and sometimes, as we have discovered since 1914, a most unfortunate net result. No student of organization can now very heavily rely upon a balance of power. Nor can we, at the moment, feel much greater hope in thinking of control as lying in all the people as they organize themselves into a nation or a government. That again, at least at the present stage of our ability to manage, is outside the range of immediate possibility.

Then how, where, can this thing we call control lie? Frequently we talk about public opinion, but some brilliant chap like Lippmann analyzes public opinion as a vague sort of thing, easily manipulated, raw, crude, hardly a control at all. Isn't it more likely that control will grow up through development of a Common Law? Professor Leiserson has himself, I think, frequently suggested the slow progressive development of a Common Law which becomes unconsciously accepted as a sort of professional standard of behavior, until it becomes almost unbreakable — the slow development of a set of acceptances by groups of humans respecting situations in which the facts are known.

If we can do away more and more with the secret diplomacies of business, with the concealment of facts, with the distortion of facts, we can trust, with Mr. Oliphant, to the future to develop something of a law of the situation, something of a common acceptance that this or that is right to do, and only this or that can be done.

Now, in that development, if it is anywhere near true, we must look with favor upon employee representation, more active and closer constructive relationships between unions and employers, and any other form of activity which tends to bring more and more of the intimate facts out to have a part in the consideration of final actions and policies. So long as we double and treble and quadruple the cases where annual surveys of market conditions are made by employers themselves, as with Mr. Oliphant, instead of leaving them helpless to the buncombe some of my fellow monarchs have passed out to them in the past, there is possibility for the growth of this law of the situation, a standard of professional ethics and practice which I think is all we can look to, at the moment, to give us the ultimate form of control.

I don't see how we can as yet get sharp ideas on the subject, but we must, nevertheless, before we can form our types of organization on the basis of knowledge of the forces that are at work, know something of what we mean by that word which we bandy about so freely, but about which I think we know less than almost any other in the industrial dictionary — control.

MR. ELLERD: I seem to sense in Mr. Oliphant's discussion a belief that some relation exists between our plan and the promise not to belong to a union. If that belief existed in his mind I want to correct it, because our plan specifically points out that membership in a union has no effect on any man's activity.

PROFESSOR OLIPHANT: I regret if I gave that impression, because I understood that that was not in the plan.

MR. STUART CHASE (of the Labor Bureau, Inc., New York City): I want to speak briefly of one or two attempts that have been made by the organization with which I am connected to promote a better basis for the cooperative plans between worker and manager.

The remarks of Mr. Dennison in respect to secret diplomacy are particularly apropos here. I would like to stress the importance of the unions' knowing the true financial condition of the employer as a basis for working out a real cooperative agreement.

The worker too often believes in a myth of fabulous profits. He is in a fair way, accordingly, by pressing his demands too far, to ruin his employer's business and to do himself out of a job. That has happened in the past. On the other hand, if he does not know his employer's financial condition and earning power, he may be led astray by his employer's protestations of poverty unsupported by facts and refrain from making a strong attempt to get a more equitable division of what may be an unreasonably high rate of profit.

In the organization with which I have been connected, we have made a number of financial surveys of employers' profit-and-loss accounts, balance sheets and general financial conditions. We have worked out a definite technique that is a valuable thing for labor organizations and I think also for management. For instance, in the New York printing trades, I made a joint survey with an accountant who represented the employers. We went over the books of some five hundred printing shops throughout the city and reported accurate and truthful results covering a period of years as a basis for wage negotiation. My brother accountant and myself made one

joint report as to the facts and then we made our separate interpretations of the facts.

Again in the case of the Naumkeag Steam Cotton Company in Salem, Mass., while the books were not thrown open to us, through our own sources of information we were able to make a very complete analysis of the financial affairs of the company, its astonishing growth, its rate of earnings, the condition of its markets and so forth. This analysis was presented to the union and was used by it in a series of negotiations which have had an encouraging outcome as the facts now stand. How the Naumkeag employees and the company are getting on at the present time may be indicated by the following clipping (March 1928) from the *Trades Union News*:

> The union realizing that in order to work steadily and maintain the high standards they are enjoying agrees to promote the distribution and sale of the product of this mill in every legitimate way possible. The efforts put forth in this endeavor have been in a large measure responsible for the Naumkeag mills ability to work steadily night and day producing a volume of yardage far ahead of its competitors. The union pledges itself to carry out economies in the manufacturing end, and is always willing to adapt itself to the introduction of new and modern machinery. While it is true that many of the workers do not realize the import and are suspicious of this part of the agreement, the more intelligent among the membership see the many advantages being gained by all. In due time every one will agree that labor too must become as important a part of industry as machinery, building, money, management and all that enters into industry, and that in order to continue to enjoy the present prosperity it must search to find where economies can be effected, which management may be unable to see.

This may be a little optimistic, but it reflects a reasonably happy arrangement between a union of three thousand men and a very prosperous and stable corporation.

Finally, we have been called upon in cases of organization, such as the recent attempt of the Pullman porters to organize. In this case, without any cooperation at all from the employer, we made for the benefit of the union a careful summary of the corporation's accounts. I analyzed the Pullman's records back to the very beginning, and made it very evident that the company is in a strong enough financial position to pay Pullman porters a reasonable wage scale.

Of course this sort of thing is absolutely worthless if it is

inaccurate, biassed or prejudiced. But if a cold statement of the facts can be presented to the union, the men know, as the Amalgamated Clothing Workers know, when is the time to press their employers for better wages and when is the time to go lightly in order to maintain the industry in a moderately healthy condition.

MR. WARREN S. BLAUVELT (Hudson Valley Coke and Coal Products Corp., Troy, New York): I have been very greatly interested in the development of the Works Committee plan and have used that plan myself for some eight or ten years. There was one thing that was not brought out by Dr. Leiserson or anyone else, which seems to me to be of very great importance, namely, that through the Shop Committee it is possible to get to the entire organization something of the dramatic value of the work that is going on. I have found that of tremendous utility not only in industries but also in the coal mines. When men and managers recognize the fact that they are not merely earning a day's pay but that they are also engaging in an important part of the work of the world, it is a good deal easier to avoid unnecessary friction. The Pit Committees that were organized by the Fuel Administration during the war accomplished equally good results in the union and in the non-union fields when they made men feel that they were winning the war, that they were saving the lives of their "buddies" and making it possible for the latter to come home more quickly. The results could never have been achieved if it had not been for the Pit Committees that got that idea across.

I have been very much interested in fact-finding, but in my opinion it does not go far enough. It is like hiring more doctors and nurses when there is an epidemic of Asiatic cholera, but paying no attention to the pollution of the water. In the coal business, as an Indiana operator, I thought that the biggest monkey-wrench in the machinery was not the Jacksonville Agreement but rather the fact that in the readjustment of freight rates after the war our rate to the great Chicago market on the weighted average was advanced, I think, 113 per cent, while from the non-union fields in the Crescents it was only advanced 60 per cent. I will say, however, that before the changes in rates the United Mine Workers had tried

to take away from the operators practically all of the geographical advantage, and they nearly succeeded. Then the railways took away more than there was left and the industry was put in a pretty bad shape.

Hence one of the very first matters for consideration is the question: Is there no such thing as an equitable system of freight rates? One section of the country can be ruined and another section of the country can be advanced by the absolute lack of any general principles to govern freight rates. In my opinion, the establishment of the principle that freight rates should vary in proportion to the cost of the kind of service rendered, and that no changes in freight rates or freight-rate relationships should be made except on this basis, might in the course of perhaps fifty years do something toward the stabilization of the coal industry.

Another point is that there has been almost no investigation to discover the ultimate results of the incidence of taxation. Taxation is of vastly more importance to industry than people generally think.

A third matter that needs to be investigated, if we we are going to remedy industrial situations, is the question of the effects upon industry of the unnecessary risks arising from the lack of any real standard of values. I do not know whether Professor Fisher's method is exactly right, but his principle is basically sound. In almost every business undertaking that extends over five years, the hazards are profoundly increased because an obligation in dollars does not mean the same thing five years hence as it does today and may mean something still different ten years hence. Nobody knows what those risks are. Industry as a whole suffers unnecessary hazards because the dollar is not a standard of values.

PART IV

PRESENT NEEDS IN INDUSTRY

THE ROLE OF INSURANCE IN PROMOTING THE COMMON INTERESTS OF CAPITAL AND LABOR[1]

HALEY FISKE
President, The Metropolitan Life Insurance Company

THE problem of industrial relations is now very much before the public eye. The history of labor and capital for the last one hundred and fifty years reveals incessant conflicts between workingmen and their employers, accompanied by terrible incidents in the way of strikes and riots and incendiarism and even murder. But there has been a great change in the last few years; both a change in the attitude of capital or employers, and then a corresponding change in the attitude of labor.

In addition to the interest which every citizen has in this subject, I have by reason of my position as President of the Metropolitan Life Insurance Company a very particular interest. That is because of the nature of our business. We have some forty million policies in force on about twenty-five millions of policyholders. These policyholders include men, women and children who live almost altogether in the cities and towns of the United States and Canada. As you see, we have close to one out of every five in the populations of these two countries insured with us. But in view of the fact that our people live in the cities, the comparison is better made with urban dwellers. We estimate that at the present time there are some sixty-seven million inhabitants in urban United States and Canada. We do better, therefore, than one out of every three in the urban population. As a matter of fact, we are even more closely associated with the public, for our business is largely a family insurance business. We estimate that we have insured with us 53 per cent of all of the wage-earners' families in the urban population available to us in our Industrial Department alone, and if we should include our

[1] Introductory Address by Mr. Fiske as Presiding Officer at the Third Session (Dinner Meeting) of the Semi-Annual Meeting of the Academy of Political Science, April 11, 1928.

ordinary and group business, we certainly have representation in 60 per cent of the homes of the two countries. The Metropolitan is, as you know, a mutual company. It is owned by its policyholders and in view of the fact that we include so large a part of the people of the country, our company is second only to the government itself in touching intimately the life of the people.

One of the first lessons we try to teach these policyholders is that they are capitalists. With about $2,500,000,000 in assets, the company is the largest financial institution in the world, and the problem is how to get home to the holders of its policies, even to these working people, that they have a share in these capital assets; that they are indeed capitalists having a direct interest in the welfare of the community as represented by the investment of capital — over $1,000,000,000 in mortgages, nearly $1,000,000,000 in securities of railroads and public utilities. For years we have been preaching that doctrine and teaching our agents, of whom we have twenty-odd thousand throughout the county, just that lesson. I think that it is important to bring to the minds of the workingmen that they as well as their employers are the owners of capital; in other words, that there is a common interest in investments, a common interest in manufacturing, a common interest in the running of railroads, in the carrying on of public utilties; and that it is their interest as well as the interest of the owners of the capital stock and of the bondholders to make these companies prosperous.

Moreover, we have been engaged for twenty-six or twenty-seven years in an effort to improve the health of these working people, to make them better citizens in the capacity to work. We have had some very amazing results. In 1911 the mortality of these industrial workers, the owners of our policies, was twenty-four per cent higher than the mortality of the general population. Our health work has brought the mortality down, in 1925 or 1926, to 1.3 per cent less than that of the general population; and when you consider that the general population includes the well-to-do and the farmers and the people who do not perform daily toil, it seems to me and it seems to everybody a very extraordinary result that we should show a better mortality among these laboring people

than among the population as a whole. The Health Campaign has been carried on in two ways. First, every industrial policyholder has the right, when ill, to the services of a trained nurse. More than thirty million visits have been paid by the nurses to the homes. In addition, in the way of instruction and education, we issue health literature. Nearly 500,000,000 pamphlets and leaflets and books have been distributed during this period. That is what you may call a direct contact with the working people, the wage-earners.

We have an indirect method of contact, which is perhaps even more interesting. The Group Division in our office issues group policies. A group policy is a policy taken out by the employer for all his employees, without regard to health, and without medical examination. Such insurance is contributory, that is to say, the working people, the employees, are paying a part of the premiums which insure their employers, and correlatively the insurance on themselves is partly paid by the premiums collected from their employers. In other words, we have brought together employer and employees in a project for the benefit of all of them, providing a common interest in the occupations in which they are engaged.

These policyholders — and there are 1,250,000 of them in this Group Division — hold insurance to the amount of $1,800,000,000. The wage-earners in the industrial departments have the benefit of the visits of nurses and the distribution of literature; but even more important, as it seems to me, is a bureau in the Group Division called the Policyholders' Service Bureau, through which we indirectly reach the wage-earners.

In other words, we are engaged in a process of education of employers in the welfare of their employees. It takes many forms. The forms of insurance alone are a very important factor, because they include insurance against death, sickness, accident, total disability, accidental death and dismemberment. In other words, the hazards of employment are carried by insurance. That of itself is a very important thing in bringing together the employers and the employees in a common interest in the work in which they are all engaged.

But we go farther than that. We are endeavoring to instruct the employers as to how they can best treat their employees. There are various subdivisions of this bureau.

There is an important one on personnel; I hardly need to explain that. There is a subdivision on safety engineering, which defines itself; one on the occupational hazards of industry, such as dust, fumes, chemicals; one on housing. We give instruction, when it is asked, on the treatment of employees which we think would be efficacious for employers to adopt: it covers cafeterias and recreation, fresh air, good lighting, washing facilities, and other factors which produce healthful conditions in working places. Then there is a very important bureau which looks after pensions. The notion is becoming quite prevalent now that there should be in these groups a pension system to which would be contributed the deposits by employer and employee, so that you may take any age you like or any amount you like, or any multiplication of the wages or fraction of the wages you like (no two pension contracts are alike), fitting them to the particular industry in question.

Think for a moment of the spectres which haunt workingmen — death, sickness, accident, dismemberment, disability, dependent old age! These are the things that we are attacking through this Group Division. We are trying to drive away those spectres and make the workingmen contented and happy. Better than all, we are trying to relieve their fear of the future, a very real fear! Through pensions, of course, a workingman's anxiety as to what will become of the family when he becomes disabled or old, entirely disappears.

The things that I have been enumerating are the constant things that worry men and make them discontented and unhappy. If we can get the employer and the workingmen together in a united, joint interest toward making the men contented and happy and fearless of the future, we have done a great deal to solve the various problems that arise in industrial relations.

There is another spectre called unemployment. We have thus far been unable to engage in unemployment insurance because the statutes of New York do not permit it. We have been agitating that subject for years. We are ready with the data on unemployment insurance through groups. Only within a day or two, I have seen some movement toward the removal of obstacles to the amendment of the law. Curiously

enough, the principal obstacle has been the attitude of the trade unions. Just why, I have asked, and they have not answered; but it has been put to them in such a way that I think I can see hope of convincing them that it would be a good thing to do.

The evolution of life insurance has brought about a change in the attitude of workingmen toward insurance generally. There was a time, years ago, when trade unions were opposed to industrial insurance and fought against group insurance on the theory that the whole problem was a matter of wages; that if men get wages which are adequate, they can support themselves and provide against the eventualities of life which worry them, and lay up money for the future.

An extraordinary sign of a change of attitude came when labor itself appealed to the legislature for permission to insure members of trade unions by group insurance. Group insurance, as I have told you, is the insurance by an employer of his employees, and they must be in the one place of business, in the one occupation. Trade-union members of course are employed in various occupations, under various employers, but united in the kind of work they do.

Out of that step grew another extraordinary advance in the formation by the unions of a life-insurance company which undertakes to insure workingmen. Some time ago I heard they had some $70,000,000 of insurance after only a year or two of operation, but most of that was group insurance. In other words, the trade unions themselves have seen the advantage of this joint contribution between employer and employee in the welfare of the working people.

There have been many other incidents which you probably have read about from day to day, indicating a real advance on the part of labor toward a better understanding of the problems which confront employers; and I have told you some of the things which indicate a better understanding by employers of their great responsibility for the welfare and the future of the human beings whom they employ. And so we feel that the picture of the future is very likely to be a very beautiful one. We can see the day — which we hope will come — when there will be that harmony in industrial relations which such discussions as this do so much to bring about.

A CONSTRUCTIVE ANTI-TRUST LAW

RUSH C. BUTLER
President, Illinois State Bar Association; Chairman, Committee on Commerce, American Bar Association

I HAVE one point, and one point only, that I desire to make in this discussion. The one point I wish to drive home is that the United States Government at the present time should enact an affirmative anti-trust law; to use a well-worn, well-nigh worn out word, it should enact a constructive Sherman Law, if you please.

The rule of the Sherman Law as interpreted at the present time, that unreasonable restraints of trade by agreement are unlawful, is traditional among English-speaking people and is a wholesome rule of conduct. It has been in effect in England for centuries without Parliamentary enactment but as Common Law. In England no regulation is provided for it; violation of it does not constitute a crime; resort to the courts is infrequent and in relatively unimportant cases. In each of these particulars the exact opposite is true of the anti-trust laws in the United States.

When the Sherman Law was enacted it read as it reads today, and for twenty-one years thereafter it was interpreted to mean that every restraint of trade, whether reasonable or not, was unlawful. That enactment put more government in business than all the statutes of Congress from the beginning of the history of the country down to the present time. In spite of many exceptions, business in general in the United States is still subject to the rule of the Sherman Law, which in actual application is not understood and is not subservient to the best interests of business and of the public.

There is necessity for a change in our laws at the present time in regard to numerous industries. For instance, the coal industry for forty years has been the football of fortune, and only for very brief, exceptional periods has it experienced prosperity. Today its condition is as bad as, if not worse than, it has ever been before. It is not only the industry that suffers;

it is the communities dependent upon that industry which suffer most. There are whole communities, as we have heard recently through the Senate Investigating Committee, in Pennsylvania in particular—and the same is true in Indiana and Illinois—which are suffering for the actual necessities of life because of the condition of the coal industry. The labor situation complicates matters very materially, but that is far from being the main reason for the difficulties in coal. Relief is needed in coal, in lumber and in oil, and Congress has indicated a way in which that relief may be granted.

Beginning in 1913, Congress started to enact laws not only granting exemption from the Sherman Law but regulating the application of the law by administrative agencies. In that year was passed the Panama Canal Act, which was the first recognition by Congress that competition could be regulated. This act entrusted the regulation of the railroads, in their ownership of competing water lines, to the Interstate Commerce Commission, a specialized governmental organization. The act established standards and in effect commanded the administrative agency to see that these standards were complied with.

In 1914 the Federal Trade Commission Law was enacted. The Federal Trade Commission was created and jurisdiction was conferred upon it to administer the rule of conduct laid down in the statute, which provided that unfair methods of competition in commerce were unlawful. This act was a recognition by Congress that competition could not of right be free and unlimited but that under certain circumstances it should be restricted.

In 1916 a noteworthy act was passed, the Shipping Board Act, which is still in effect, conferring upon the Shipping Board — please note that Congress used discrimination in the selection of its administrative agencies — the power to approve agreements in restraint of trade made between competing American steamship owners, in which they agreed as to the rates they would charge for transportation of passengers and property, allotted their tonnage and otherwise limited competition between themselves. The standard was established in that Act, that these agreements could be effective only in so far as they did not adversely affect American commerce.

There is the first recognition by Congress, that I know of, that it was possible under the Sherman Law for competitors to agree upon prices and to agree to limit their activities and the territory in which they would operate.

On the same day the Shipping Board Act became effective, the Federal Reserve Board Act also took effect, and in this Act Congress conferred upon the Federal Reserve Board the power to permit banks competing in this country to cooperate in the establishment of banks abroad.

In 1920 the Transportation Act was passed, conferring additional jurisdiction upon the Interstate Commerce Commission in the regulation of railroads as regards the consideration that they should give to competition in the determination of rates, fares and charges.

In 1921 the Packers and Stockyards Act was passed, conferring upon the Secretary of Agriculture the power to administer the stockyards of the country in conformity with the standards established in the act.

In 1922 the Capper-Volstead Act became effective, which provides in part that persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers, may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce such products of persons so engaged, permitting them to fix prices, restrict output, and limit the territory in which they would deal. This act has not been passed upon by the Supreme Court, so far as I know, but in its decision in the Liberty Warehouse Company Case the Supreme Court refers to the act in a way in which it would probably not refer to it if it felt the Act were unconstitutional.

These, and other Congressional enactments, indicate that the view of Congress nowadays, since 1913, is that competition may be regulated, that it should not be unlimited; that individual industries may be regulated; that price agreements among competitors are proper, subject to governmental approval; and of great importance, that these regulatory or administrative activities should be committed to experts in the particular subject entrusted to their care.

We have a peculiar situation in this country under the Sherman Law as presently interpreted, in that some of our largest corporations are held not to be within the law, as the Steel Corporation, the International Harvester Company, and others; and on the other hand we have some very large corporations that have not been put to the test but which by common consent are not within the terms of the law. Yet, take the situation such as we find it in the automobile industry: one company having purchased the properties of several competing companies, is now manufacturing the cars of those competing companies and singly and by itself putting the prices upon those cars. If, on the other hand, the competitors of the General Motors Corporation, such as Packard, Hudson, Chrysler and Ford, or any group of four or five competitors manufacturing the same class of cars, were to fix their prices by agreement, even though the prices were reasonable, their agreement would be unlawful.

This situation is not serious today but it may become serious in the future. Our smaller units in industry need protection, they need an opportunity to compete on an equal basis with the larger units, and it is only by cooperation of this kind, that can easily be made effective if the government will grant the privilege, that the end can be accomplished.

The government has gone as far as it can under the law as it exists. The courts can do nothing; the executive department of government can do nothing. The only relief is through the enactment of legislation creating agencies that will administer the law for the new industies put within its provisions. In the Trenton Potteries Case, decided by the Supreme Court within the past year, it was held that an agreement among competitors fixing reasonable prices was nevertheless barred by the Sherman Law because the agreement was an unreasonable restraint of trade. The court clearly indicated, if anything was indicated by that decision, that if Congress saw fit to enact a statute making agreements of that character legal, the courts would be bound to abide by the act of Congress.

In the Cline Case, which was appealed from the Supreme Court of Colorado to the Supreme Court of the United States, a Colorado statute was involved, and the highest court specific-

ally stated that it was because the legislature had not established a definite standard, that is, had not gone far enough in indicating what agreements were to be excluded from the operation of the statute, that the statute must fail. The court used the following words: "The real issue which the act would submit to the jury would be legislative, not judicial." That indicates that the jury called upon to determine the standard had no constitutional right to do so, but that if Congress or if the legislature of the state of Colorado had established an intelligent standard, the courts would have been obliged to follow it.

There is no reason to suggest that the criminal provisions of the Sherman Law be repealed. The people are too much enamored of the Sherman Law to do anything of that kind, but as I have said, the violation of the anti-trust laws of England is not a criminal offense. No one is advocating price-fixing that I know of, except prices fixed by agreement subject to approval by an administrative agency.

That an affirmative rule of conduct can be established is perfectly clear from the fact that the Capper-Volstead Act, which I just referred to, contained such a rule, and from the further fact that the Interstate Commerce Act passed in 1887 merely provides, in Section 1, that all rates shall be just and reasonable. The Interstate Commerce Commission is given the power, and has for many years exercised the power, to administer that statute. Section 2 likewise provides that rates shall not be discriminatory or unduly preferential. Hence there is no difficulty whatsoever in finding precedents to justify the suggested legislation. I am not speaking for any organization or committee to which I belong, but expressing my personal views.

President Wilson in addressing Congress on January 20, 1914, said, recommending the enactment of the Federal Trade Commission law: "The business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and the information which can be supplied by an administrative body." That statement applies just as much today as it did then, in so far as the matters about which I have spoken are concerned, namely, agreements

fixing prices, limiting production and allotting territory, especially in the natural resource industries which are so much in need of such remedial relief.

Ours is a government of laws and not of men. If the principles upon which our legislative policy is based are sound, men of integrity, ability and vision can be found to administer these laws. The administration of laws of this character will do away with government in business and put business in government.

A LIBERAL INDUSTRIAL POLICY

B. SEEBOHM ROWNTREE
Chairman, Rowntree Cocoa Works; Member, British Liberal Industrial Inquiry

THE generic title of this symposium, I understand, is "Present Needs in Industry." It would obviously be grossly impertinent of me to discuss the special needs in American industry; during the last four or five years, however, I have been studying on the spot industrial conditions, not only in America and in Canada, but in Japan, in India, in South Africa, in Australia, in New Zealand, and in certain other countries, and I have come to the conclusion that basically industrial problems are the same all over the world. There are superficial differences; the industries in the different countries are in different stages of development; but when you come down to fundamentals, the needs and the problems of industry are everywhere alike. Therefore if I say something about the recent developments in the relations of capital and labor in Great Britain, it is because our problems are fundamentally the same. I think it is helpful for people who are approaching questions from somewhat different angles to exchange experiences.

In Britain we are slowly and somewhat painfully passing out of a very difficult period in our industry. We have had seven years of very great industrial depression. That it should have been so is in no way surprising. England is dependent for prosperity in her industry upon her ability to export thirty per cent of the goods which she produces. When the end of the war came, we found the markets of the world disorganized and currencies debased. Our inabilty to supply the goods which we had been in the habit of supplying for a generation or generations, had led different countries to begin manufacturing for themselves; and then, having invested their capital in these industries, they protected them by high tariffs. Consequently we have found it extremely difficult to emerge from our depression.

Economists foretold this depression before it came. There is nothing surprising in it. I remember talking to one distinguished economist in the closing year of the war and I asked him what he thought was going to happen. He said, "We shall have a short period of dislocation, we shall have a short period of boom, and then we shall have ten years of the worst period of unemployment that England has ever known." To use a military expression, matters are proceeding according to plan. We are getting on with our ten years; we are steadily working down our unemployment. Our abnormal unemployment has been reduced from a maximum of 1,800,000 to 500,000, and every week now we are reducing it by about 25,000.

This period of adversity from which we have suffered has not been without its advantages. Adversity, they say, makes good bedfellows: certainly the adversity through which we have passed, and through which we are still passing, has led us to recognize that we really can no longer afford the luxury of fighting; that employer and employee must get together.

There has been a very striking change in the attitude of the trade unions. The change had been coming for a number of years. There had been a slow but quite steady development of a desire for cooperation on the part of the trade unions. That has been very greatly accelerated by the adversity through which we have passed, and now at the last Trade Union Congress an olive branch was held out. An offer was made to the employers: "We are willing to cooperate to increase production and to bring out better relations if you will come halfway."

That challenge was taken up by the employers. At the present time a number of the leading employers in England, representatives of all the largest industries, are meeting the representatives of the trade unions with the purpose of trying to thrash out some method of developing the spirit of cooperation and of breaking down the miserable misunderstanding which stands in the way of all real progress. I think some rather interesting developments may arise out of this conference.

When the employers and the employed get together around a conference table, each party will find very often that the

fault lies with them, when they have been in the habit of attributing it to the other party. I think that is true both of employers and of workers.

Some of us engaged in industry and interested in the politics of industry have for years been working on this problem of cooperation between employer and employed, and we have come (as you in America have come) to recognize that lasting cooperation cannot be attained by any superficial means. You cannot get lasting cooperation so long as you have two opposing forces merely seeking to maintain peace by a series of treaties. You must dig down into your problem, dig down and down until you arrive at some point where the interest of the two parties is the same, and then you must try to build up your industrial policy upon that basis. It is futile to skate over the surface of the problem, trying just to do a little bit here and a little bit there, when really the interests of the two parties are fundamentally opposed.

Now, if you dig down deep enough you come to the fact that fundamentally all industry is just service of the community. You may say, "Oh, well of course that is a platitude, and a priggish one at that." It is, however, hard fact, whether we like it or not, that fundamentally all of us who are engaged in industry are engaged in serving the community. How long could the United States of America go on without its industry? How long could our little crowded Britain go on if the industrialists, all of them, employers and workers, were to decide to shut down their plants? In a very few weeks we should starve.

Coming to a little more concise definition, I would put these three aims forward as the aims of industry:

1. Industry should create goods or provide services of such kinds and in such measure as may be beneficial to the community.

2. In the process of wealth production industry should pay the greatest possible regard to the general welfare of the community and pursue no policy detrimental to it.

3. Industry should distribute the wealth produced in such a manner as will best serve the highest ends of the community.

If employers and employed could agree upon these as the aims of industry, then on this common ground employers and employed could cooperate to try to work out in detail an industrial policy which will carry out these aims.

Your Chairman has told you of the work that has been done by the Liberal Party in England in trying to work out an industrial policy for Britain.[1] It was a very interesting and important committee that worked upon this problem. Men like Lloyd George, Sir Herbert Samuel, Sir John Simon, Philip Kerr, W. T. Layton, J. M. Keynes and Sir Josiah Stamp cooperated in this work and they produced a rather awe-inspiring volume of five hundred pages. Just before I sailed from England, a great convention of the Liberal Party, with 1500 delegates from all over the country, accepted the findings of this committee. I had a very small part in this work myself and therefore I can speak of it impartially. I think this is the best constructive thinking that has ever been done in England on the question of industrial policy.

As regards the causes of discontent in industry the committee observes:

> What are the causes of this discontent which finds expression in wasteful strife or in still more wasteful restriction of effort and output? The thinking workman makes five main complaints against the existing industrial system. First, for all his toil it does not supply him in many cases with an income sufficient to give a comfortable livelihood for himself and his dependents, together with a margin for rational enjoyment and for saving.

The committee proposes an extension of the trade-board system which we already have in England in connection with a number of industries, and which fixes, after a conference between representatives of the workers and representatives of the employers with certain appointed members acting with the others, statutory minimum rates of wage below which no employer may employ a workman. The committee recommends an extension of these trade boards, and further an extension of the Whitley Councils. The Whitley Councils are councils which are created voluntarily by the trade unions and the employers in different industries for the discussion of all kinds of questions affecting the industry. The committee recom-

[1] *Cf.* Mr. Richardson's paper, *supra*, p. 20 *et seq.*

mends that these councils, under certain safeguards, be given statutory powers to enforce their findings. At present, being voluntary associations, they have no power to enforce their findings at law.

The second complaint that the thoughtful workman makes is:

> that industry has failed to give him security of livelihood, however eager and willing to work he may be. Accident, a spell of sickness or a shortage of work due to no fault of his own, may at any moment throw him out of employment, use up his savings and inflict hardship and humiliation upon his children. Of all these menaces unemployment is the most serious and it inspires the belief that there must be something wrong with a social order in which amidst flaunting luxury such insecurity haunts the life of the worker.

You know that we have unemployment insurance in Great Britain. I know of no subject on which I hear more arrant nonsense talked in every part of the world than with regard to the working of our unemployment insurance in Great Britain. Everywhere my sense of justice is offended by hearing it being referred to as a dole. When a man who has life insurance in the Metropolitan Life Insurance Company dies and his widow collects the insurance, you do not say she is getting a dole. She is getting something for which she and her husband have been insuring for years. In the same way under our unemployment insurance scheme a man insures against the risk of unemployment, over which he has no control and for which he is not responsible, by paying every week in which he is at work sixteen cents insurance. In addition to this his employer pays eighteen cents while the state pays, if I remember rightly, twelve cents. Then, when he is out of work, the worker receives a certain proportion of his pay. This arrangement has been in operation for some years. There is not a single political party that would think for one moment of annulling the Unemployment Insurance Act. There is not a single party that is not convinced that it has been of inestimable advantage to the community during this period of great adversity.

The Liberal Party recommends that unemployment insurance shall be continued, but the party also proposes that with the purpose of lessening the volume of unemployment very

much bolder steps should be taken to develop the capital resources of the country during periods of trade depression, by constructing harbors and roads and afforestation and reclaiming waste lands so that when the period of industrial depression is over, England may be in a better position to take advantage of industrial activity when it comes along.

The third complaint that the worker makes is:

> That the existing industrial order denies him the status which seems proper for a free citizen. He may be dismissed at a week's or a day's notice and thus deprived of his livelihood without redress or appeal, perhaps for no better reason than that he has offended an autocratic foreman. While as a citizen he has an equal share in determining the most momentous issues about which he may know very little, in regard to his own work, on which he has knowledge, his opinion is seldom asked or considered, and he has practically no voice in determining the conditions of his daily life except in so far as trade union action has secured it. Indeed, where management is inefficient and autocratic, he is frequently compelled to watch waste and mistakes of which he is perfectly well aware, without any right of intervention whatever, and this despite the fact that when these errors issue in diminished business for the firm concerned, he and not the management will be the first to suffer by short-time working or complete loss of employment.

The status of the worker in industry today is out of harmony with the modern conception of human relations. We talk about cooperation in industry, but if you are going to have true cooperation you must treat the worker as a cooperator and not as a servant, and that gives him quite a different status from what he had, say, twenty years ago. Twenty years ago he frankly accepted the position of a servant, and all that he prayed was that he might have a good master. In England that attitude has entirely disappeared. The worker quite definitely demands now that he shall be regarded as a cooperator, and it seems to me a perfectly reasonable demand to make.

Here we come to very definite proposals. The Liberal policy is to seek to set up machinery for organized cooperation in individual workshops and factories without impairing the necessary authority of the management. Obviously, in any properly conducted business the last word must lie with the management, but at the same time one can go a very long way in giving the worker a say as to the conditions under

which he shall be employed. We recommend that there shall be a statutory Works Council in every factory of, say, fifty employees; that every worker shall be given a written statement of the terms on which he is engaged and the terms under which he may be discharged; that one of the duties of the Works Council shall be to work out a system of works rules which shall govern the human relations in the factory; and that safeguards shall be given to the worker against arbitrary dismissal. The functions of these councils shall be mainly consultative. Experience has shown (in Germany where they already have these statutory councils and in thousands and thousands of factories all over the world where they have voluntary councils) that once employer and employed have got into the habit of sitting around a table together and discussing affairs concerning the factory, then a new spirit of cooperation grows. It really means that there shall be in a factory, not a soviet, but that there shall be government by consent.

The next point that we suggest as a cause of discontent is that:

> Knowledge of the financial results of industry and of the division of its proceeds is denied to the worker and of this he is becoming increasingly resentful. He has little means of judging to what extent he is in fact participating in the fruits of his own labors or whether or no he is getting "a square deal," and his dissatisfaction with the existing order is proportionately intensified.

A good many employers in England are horrified at the thought of telling their workers what is the financial position of the business. I do not know how one can cooperate with men who have only the vaguest knowledge, or no knowledge, of whether the business is successful or not. I do not know how you can develop a spirit of confidence when the workers have no means of knowing whether they are really getting a square deal or not. When the employer tells them that he can not afford to pay higher wages, they have to take the word of the employer without knowing the facts. But surely men in business ought not to be afraid of sharing this knowledge with regard to the financial position of the business with the workers who are engaged in it.

And then finally:

The worker believes that the products of industry are unfairly divided between Capital and Labor; that under the capitalist system society is divided into two classes: a small class of masters who own the means of production or live luxuriously by owning, and a huge class of workers who receive in return for their work only what they can force the owners to pay. He believes that under such a system there can be for his children no true equality of opportunity with the children of more fortunate classes.

The Liberal Committee did not feel that they could make any definite recommendations for statutory action in this matter, but they very strongly urged that every step should be taken to encourage the policy of profit-sharing and co-partnership. In America you have gone a very long way in this direction. I believe it is thoroughly sound. I believe it is quite unsound to think that the residual legatee with regard to the surplus profits in industry must always be the capitalist, and I am sure that the worker feels that such an assumption is unjust. If you want real cooperation then you must have a real partnership. I believe that we shall have to find some way of making the workers partners in our businesses, either by profit-sharing or perhaps better still by co-partnership, giving them stock instead of giving them cash; but in some way or other they must have an interest in the prosperity of the business in which they are engaged.

These very briefly, very crudely and very inadequately, are the lines on which liberal thought (and liberal is not used here in the political sense) is moving. I believe that the basic thing is that there shall be agreement with regard to what the fundamental aims of industry are, and I would like to see those three aims which I defined accepted by all concerned. Some may say, "Oh, those three aims are all right on a platform but they won't work in a factory; they are not practical; they are merely idealistic." But just think for one moment what such a criticism means! In our national life we would never think for a moment of adopting a policy which was merely in the interest of the strong or of a favored few. We seek to legislate in the interest of the whole community, and that is a perfectly sound thing to do.

In the development of civilization man passes through three stages. First it is a case of every man for himself — "nature red in tooth and claw." The ego is the center of each man's

universe. Then gradually and slowly man passes from that stage, until the interest of the ego is merged in that of the family and the clan. The third and final stage is when the interest of the clan is merged in the interest of the whole community. Men have not reached their full development until they reach that final stage. No nation is stably founded until it has reached it. Now, can we have a lower standard for industry than we have for our national life? The two are absolutely interwoven the one with the other. I believe that we have got to be idealistic with regard to our industry; I believe that it is only on those lines that we can possibly hope for any lasting cooperation between capital and labor. There is in mankind a steady urge upward to what he knows to be the highest and the best, and you can always appeal with confidence, in the long run, to that steady urge of mankind.

Do you remember the appeal that Garibaldi made when he was seeking to raise men to fight the Austrians? This was the appeal that he made as he went in his red shirt through the villages of Italy. "Come!" he said, "He who stays behind is a coward." "I offer you hardships, privations, wounds and battles, but we will conquer or die!". In answer to such an appeal men flocked to his standard.

And I believe that is what we have got to do. If you merely say, "I want you to work because it will pay you, because you will make money," I don't believe you will ever get the best out of men. I believe you have got to appeal to men on the highest grounds, and only on those grounds can we get lasting cooperation and peace.

RATIONALIZATION IN INDUSTRY AND THE LABOR PROBLEM

FELIX FRANKFURTER
Professor of Law, Harvard University

LAW and industry are both instrumental. They exist not for themselves. Unlike the arts, unlike the abstract speculation of thinkers, law and industry subserve purposes or they have no cause for being. And because industry is instrumental, all of us have a right to have opinions about it; indeed, informed opinion is essential if the purposes which justify industry are to be achieved.

If I remember Mr. Rowntree's words aright, he said that the problems and the need of industry are substantially the same the world over.[1] And so, one speaking from the particular viewpoint which I happen to share need only say that in substance everything which Mr. Rowntree indicated as to the needs and the social direction of industry in England applies to this country. Let me therefore only briefly repeat what he said, as coming from an American experience, not of one engaged in industry, but of one whose task, whose duty it has been these many years to concern himself with what I venture to call the instrumental aspect of industry, namely, the production of goods, and the performance of services directed toward the good life.

In this country there have been a good many investigations into industrial conditions of major account, particularly since the Pullman strike, but none as well-rounded, as comprehensive, as apt to be so enduringly fruitful, as this altogether admirable report of the British Liberal Industrial Committee.[2] It is fair to say, however, that the major investigations — the Industrial Commission of the 'nineties, the Industrial Commission of 1915, the reports of the President's Unemployment Conferences in 1920 and 1921, the special Hammond Committee investigation into the coal industry — in all their scope reduce themselves in their essentials to two major difficulties. If you boil down all the particulars, all the enumerations of

[1] *Cf. supra*, p. 162.

[2] *Cf. supra*, pp. 21, 165-169.

specific items of discontent and inadequacy in American industry, you will find they are referable to two central sources: first, the lack of scientific organization of industry; and second, discontent arising from the consciousness of workers of the disparity between the rights, the opportunities, the privileges, the exercise of faculties that they enjoy in the political world, and the lack of opportunities for controlling their economic life.

Now as to the first point, the lack of scientific organization of industry, there is a slogan which is very prevalent in England and, I think, will shortly become a catchword in America. English writers these days talk about "rationalization", which means nothing except the rational conduct of industry. That involves the elimination of waste, continuity of production, a scientific layout, Taylorism and all the rest of it — the application of systematic intelligence to the organization and conduct of industry. We have gone a good way in that direction in this country, but bear in mind that we have not begun to exhaust the possibilities that science lays open. The application of scientific procedure to any human activity is a continuous and progressive process, and implies organic treatment. And so when you come to the question of the scientific organization of industry through the elimination of wasteful methods, you must bear in mind that a remedy which merely deals with this or that defect in isolation may in its turn introduce as much harm as it eliminates.

Take for one minute what Mr. Butler was talking about, namely, the wasteful present-day organization of the coal industry: the needless number of mines; the excessive number of miners; the lack of economies due to inadequate concentration and distribution of commodities.[1] Merely to remove the restraints imposed upon industry by law would not remove the essential difficulties of industry, and particularly of the coal industry. That is part, and only a part, of the problem.

In 1918, ten years ago, the then Fuel Administrator, President Garfield of Williams College, wrote about the anthracite industry in the following language, and what was then true of that industry is even more applicable to the bituminous coal industry:

[1] *Cf. supra*, pp. 156-161; also pp. 128-138.

> One general aspect of the anthracite situation was made clear which we deem very pertinent for consideration. It appears that there is lacking the basis for scientific knowledge in regard to some of the underlying facts of the industry upon which issues as to wages and output must finally be decided. Therefore, steps should at once be taken whereby systematic and authoritative information will be had in regard to such fundamental questions as comparative earnings, labor turnover, continuity of employment and sufficiency of output. We must create conditions which will assure greater continuity of employment, greater regularity of work, greater quantity of output, at the same time that we fully observe all those safeguards which should protect the workers in this hazardous industry. In a word, the conditions of the industry must be stabilized. Therefore, the attitude of mind of those in the industry in regard to those conditions must be organized.

Mr. Garfield was talking about "the attitude of mind"; not merely the *matériel,* the physical plant conditions, but the all-essential attitude of mind, or what Mr. Rowntree called the approach, which considerably affects those physical and material policies on which Mr. Butler is concentrating.

Since President Garfield wrote, we have had the Hammond Commission, headed by a man of leadership in the industrial world. Yet its recommendations remain neglected in a big volume gathering dust on library shelves. Nothing has been done to grapple with the real issues of the coal industry. The same difficulties, the strife, the cruelties, the recriminations and counter-recriminations that we have heard for twenty years or more are just as alive as they were twenty years ago. In some other industries, of course, that is not true. Rationalization along the line of scientific standards has made great headway; but until and unless progressive science is continuously in the harness of industry to produce the greatest volume of goods needed, and properly needed, by the community, with the best employment of human labor, the goal will not have been attained. I take it that Mr. Richberg (not that he has authorized me to speak for him) and Mr. Butler will both agree, although they are both lawyers, on this point: that you laymen have a right to insist that law be prompt, economic and effective in carrying out the purposes of law. Equally have we laymen in industry a right to insist that there be an application by all those who are directly engaged in industry of those procedures, those processes, those appliances and those aids which we call science, whereby industry may be conducted in

the way of rationalization. Wherever you find an accomplishment such as Mr. Dennison's at Framingham, such as one finds in various industries throughout the country, that special, unique, particular achievement must be made the clew for extension, for improvement, for general application throughout industry.

For with all our prosperity we are in great difficulty. It is probable that, although statistics are too uncertain for dogmatism, in this country there is a larger percentage, proportionately, of unemployment than in Great Britain. I know that Mr. Ford denied that there was any unemployment, when he landed in England the other day. He said, "Anybody who wants a job can get one." But those of you who have read the report of the Secretary of Labor of Mr. Coolidge's Cabinet, will remember that he reported in that delightful euphemism which statisticians as well as lawyers sometimes employ, a "shrinkage in employment" since 1926 amounting to nearly 1,900,000 — "a shrinkage of employment," and the headlines all over this country reported that only 1,800,000 or almost 1,900,000 were out of employment. But as the *New York Times,* the *Journal of Commerce,* and others have pointed out, that implies that there had been no "shrinkage" up to 1926, and of course there was. We must rely on approximate estimates; we do not know for certainty. But sufficient indications lead us to conclude that in 1926 there was an unemployment of 1,000,000. The figure for present unemployment would then be close to 3,000,000. But if you cross-examine the figures of the Secretary of Labor, you will find that he based his report on the representative character of manufacturing and railroading as characteristic of industry at large and used New York figures as typical — as to both these assumptions there is the greatest difference of opinion. The American Federation of Labor reports that between 17 and 18 per cent of its own membership is out of work. The guess is not too unconservative that probably the unemployment figures are somewhere around 4,000,000. Regardless, however, whether they are 3,000,000 or 4,000,000, it is plain that 3,000,000 or 4,000,000 out of a total working population of 23,000,000 is a proportion which is larger than the present unemployment in Great Britain. This is not merely a temporary condition. The

Secretary of Labor attributes it to a permanent element, at least permanent for some time to come, namely, increase in efficiency, increase in production coincident with decreased man-power. Hence we have a brand new unemployment problem in this country, that is, unemployment due to efficiency.

This brings me to the second aspect of our situation, namely, the feeling that somehow or other our vast bodies of people have not that share, or even an aliquot share, in the direction of their economic life that they have in their political life. Here again I can only agree with every word which Mr. Rowntree said. You cannot exhort "good-will." Instruments for securing good-will, processes and institutions for making good-will effective, must be achieved, and I do not know of any means of achieving this result except to provide a permanent and authoritative channel of expression for the viewpoint, the knowledge and the interests of the workers.

I can understand quite clearly that business men should have difficulty sometimes in recognizing the right of workingmen to cooperate in an organization and to have their interests, their knowledge and their viewpoints expressed by their representatives, whosoever those representatives may be. I can understand men of self-reliance, of intiative, men who know exactly what needs to be done, not wanting to be bothered with trade-union representation. I confess, however, I have never been able to understand how lawyers, except lawyers without a sense of humor, can oppose the right of men to organize and to be represented by their own representatives, chosen however they may please, because the very nature of the legal profession is representative service. Every lawyer is somebody's representative. Only a fool has himself for a client. The legal profession is based on the right of people to have their viewpoint, their interest, represented by persons of their own choice.

There is the greatest possible waste of energy in this country in keeping alive the issue of labor organization as a fighting issue. Just as soon as you recognize the legal rightness of trade unions — and what I have said has the highest authority, at least for one in my profession, the utterance of the Supreme Court of the United States — just as soon as you recognize also the social necessity of trade unions, generously, fully, reasonably, and in action, then the whole temper of the trade unions will change; or at least we have a right to expect it to

change. Just as soon as you recognize their rights, you subject them to a responsibility for the common good and you bend both them and the employers to those common ends, to those instrumental purposes of society for which industry is organized.

The details of the kind of unions you should have, who should be the spokesmen, and so forth and so on, should be worked out as the Mond Committee in England is at present working out with the Committee of the Trade Union Conference the general considerations which Mr. Rowntree laid before us. But I believe the life of this country, its effectiveness in achieving good-will, is to a large extent poisoned, thwarted and frustrated because of the refusal to recognize generously, in action, that workingmen have the right to be represented by whomsoever they choose, and must learn by experience, as we all must learn by experience, to choose their spokesmen wisely.

Labor's right of organization being recognized, it would be incumbent upon management and men together to deal with such subtle new problems in industry in the United States as the one referred to in Secretary Davis' memorandum, that is, the vastly accelerated increase in production with a decrease in man-power. Intelligence, restraint, and good-will will be required, on the part of employers and trade-union organizations, in dealing with this new phenomenon, dealing with it always from the social point of view. If fewer men can produce more than more men produced ten years ago, then we can afford to lift our whole social level. Child labor ought to cease as a practical problem. Not only has the need for child labor, even on the manufacturer's basis, disappeared, but child labor has become destructive. We ought to deal generously with women in employment, with hours of labor, with the whole problem of relieving the burdens of present-day monotonous industry, and with the question of allowing workers to share, as Mr. Rowntree pointed out, in every aspect of productivity.

Aristotle long ago indicated that the test of civilization is the extent of fruitful leisure. As the necessary hours and days for toil lessen, we shall have to devise and maintain a dignified outlet for new-born leisure, as soon as new inventive powers and methods of scientific organization have produced for the community's needs goods in abundance.

This has been merely a repetition, applicable to American conditions, of what Mr. Rowntree has said. Let me refer you in closing to the utterance of another Englishman, a great countryman of Mr. Rowntree's. Huxley came here in 1876 to speak on the occasion of the founding of Johns Hopkins University. It was then the custom of English visitors either to marvel at our greatness or to despise our uncouthness. Huxley penetrated beneath the surface and said more than fifty years ago what I should like to leave with you now:

> To an Englishman landing upon your shores for the first time, travelling for hundreds of miles through strings of great and well-ordered cities, seeing your enormous actual, and almost infinite potential, wealth in all commodities, and in the energy and ability which turn wealth to account, there is something sublime in the vista of the future. Do not suppose that I am pandering to what is commonly understood by national pride. I cannot say that I am in the slightest degree impressed by your bigness, or your material resources, as such. Size is not grandeur, and territory does not make a nation. The great issue, about which hangs a true sublimity, and the terror of overhanging fate, is what are you going to do with all these things? What is to be the end to which these are to be the means? You are making a novel experiment in politics on the greatest scale which the world has yet seen. Forty millions at your first centenary, it is reasonably to be expected that, at the second, these states will be occupied by two hundred millions of English-speaking people, spread over an area as large as that of Europe, and with climates and interests as diverse as those of Spain and Scandinavia, England and Russia. You and your descendants have to ascertain whether this great mass will hold together under the forms of a republic, and the despotic reality of universal suffrage; whether state rights will hold out against centralisation, without separation; whether centralisation will get the better, without actual or disguised monarchy; whether shifting corruption is better than a permanent bureaucracy; and as population thickens in your great cities, and the pressure of want is felt, the gaunt spectre of pauperism will stalk among you, and communism and socialism will claim to be heard.
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> Truly America has a great future before her; great in toil, in care, and in responsibility; great in true glory if she be guided in wisdom and righteousness; great in shame if she fail. I cannot understand why other nations should envy you, or be blind to the fact that it is for the highest interest of mankind that you should succeed; but the one condition of success, your sole safeguard, is the moral worth and intellectual clearness of the individual citizen. Education cannot give these, but it may cherish them and bring them to the front in whatever station of society they are to be found; and the universities ought to be, and may be, the fortresses of the higher life of the nation.

INDUSTRIAL ARBITRATION[1]

RUSH C. BUTLER
President, Illinois State Bar Association; Chairman, Committee on Commerce, American Bar Association

BY a strange anomaly of the Common Law an agreement to submit a controversy to arbitration is not binding. It is revocable. The courts will not enforce it if either party objects. For nearly three hundred years this was the rule in England, and with some exceptions it is the rule in the United States today. The Federal Arbitration Act approved February 12, 1925, provides that agreements to arbitrate shall be irrevocable and enforceable, but excludes from its operation contracts of employment of seamen, railroad employees and any other class of workers engaged in foreign or interstate commerce. The result, so far as the Federal Courts are concerned, is that an agreement to arbitrate a so-called commercial dispute, that is, one arising between business men, is enforceable, while an agreement to arbitrate an industrial dispute, that is, one arising between organizations of employers and of employees, is not enforceable.

The facts concerning industrial controversies are too well known to require recital here. Many of them culminate in warfare; many of them although perhaps terminated are never settled; in some industries the appeal to peace is not so strong as the will to war. Under existing laws there is little encouragement to arbitrate. The ultimate hope of the contenders is litigation or warfare. Either method of settlement results in stoppage of work, maladjustment of business, financial loss to both parties and injury to the public.

For several years the Commerce Committee of the American Bar Association has been conducting an investigation and making an intensive study of conditions in the realm of industrial controversy in the hope that some substitute for warfare might be found. From the record made before the Com-

[1] This paper was read by title at the Semi-Annual Meeting of the Academy of Political Science, April 11, 1928.

mittee it seems to be the consensus of opinion of specialists on the subject as well as of industrial managers and labor leaders that agreements containing arbitration clauses make for peace in industry, and that under them the courts will function not more than they do now, possibly less. P. W. Martin, research worker in the International Labor Office, in outlining a program of procedure, said that the best method of cooperation between employer and employed seems to be one which provides: first, for the prevention of disputes, that is, for a continued collaboration of the two sides, a collaboration broader than could be built merely on the settlement of disputes, a collaboration based on common interests of the two parties; second, for machinery set up in advance; and, third, for the most desirable form of settling industrial disputes, namely, by agreement of both sides made in advance to submit all controversies to arbitration as the last resort.

The primary concern of business men in this matter lies largely in agreements to submit *future* disputes to arbitration. It is far easier and simpler to obtain such an agreement as a part of the original contract of relationship between employer and employee at the time when the parties are in accord, than to come to such an agreement after contention has arisen between the parties.

Arbitration is even more applicable to the industrial than to the commercial field, because in the latter one is dealing largely with dollars and cents, whereas in the former one is dealing with human relationships.

Among the advantages of such an agreement to the employer (outside of the fact that it is enforceable) are that the employees waive the right to strike pending the award, that labor conditons are stabilized, and that a better class of employment and employees is assured.

The essentials of the agreement are: (1) that it shall be irrevocable; (2) that it shall constitute a defense to court proceedings; (3) that in the event the parties fail to name the arbitrators in accordance with the agreement, they may be named by third persons or agencies, such as the court; (4) that performance of the agreement to arbitrate may be compelled; (5) that the courts shall have power to enforce the award; and (6) that during the period of the existence of the agreement there will be no interruption of industry.

It is also essential that the arbitrator be chosen by the parties, and not by a stranger to the arbitration agreement, unless by reason of the failure of one of the parties to make a choice. This point is insisted upon strongly by those interested in the arbitration program. It is also urged that it is of great value to submit all controversies in an industry to one arbitrator or board of arbitrators who shall decide all disputes. This gives the contending parties the benefit of special knowledge and experience, and tends toward stabilization of their industry.

Mr. W. Jett Lauck, a distinguished student of labor conditions in this country who acted as economist for President Wilson's commission on industrial relations, heartily concurred in the idea of enacting state and federal legislation making agreements to arbitrate enforceable. He said it would afford protection and stability to both employers and employees as well as to the public.

From an exhaustive record made before the Committee on Commerce, the Committee has arrived at the definite conclusion that the time has come when provision should be made for the settlement of industrial controversies along economic instead of military lines. While I cannot at present speak for the Committee, at least one member of it is convinced that the first step in a remedial program should now be taken, namely, the enactment of federal legislation making irrevocable and enforceable all agreements between employers and workers to submit their differences to arbitration. There is a strong public demand for such legislation. No complaint has been made before the Commerce Committee as to the merits of the proposal. Employers' and employees' representatives and experts in the field of industrial study and investigation have approved it. William Green, President of the American Federation of Labor, in commenting on the activities of the Commerce Committee, said: "If we can create a state of public mind favorable to effective cooperation and industrial peace, we will have achieved a most worthy purpose and object." The eminent counsel for the National Association of Manufacturers, James A. Emery, has expressed the view that with the acceptance by all concerned of the responsibilties imposed by it, the suggested legislation would

be a great step forward. Matthew Woll, Vice-President of the American Federation of Labor, has expressed the view that an agreement to arbitrate, when freely and voluntarily made, should be given legal sanction. He has stated that the parties should be at liberty "to determine at the time of making such agreements the methods by which such contractual obligations should be enforced and if violated by either of the contracting parties to determine the measures to be resorted to by the injured party in removing the violation of the contract without bringing into these issues the courts or burdening them with these industrial problems . . . . Decisions . . . . would have the status of law."

Charles L. Bernheimer, whose large experience in actively promoting the enactment of the federal and New York arbitration statutes gives his opinion the highest value, says that arbitration is the most humane form of adjusting differences, that it is a moral and ethical proposition. He favors the irrevocability of agreements to arbitrate when freely and mutually entered into in advance of dispute. The arbitration must be voluntary as opposed to anything that even savors of compulsion. Given the sanctity of a contract, such an agreement becomes a private law, so to speak, between the parties making it. He believes the attitude of business men as well as of workers throughout the country is favorable to the proposal. There is a growing tendency to depend upon tribunals created within separate industries to solve industrial problems. "Democracy in education has brought about democracy in industry." There is an ever-increasing demand for a form of self-government in industry within but not in any way above the law. Men have come to believe in less government in business. Industrial self-government is a practical ideal.

Some of the beneficial results obtained in those industries in which arbitration has been effective under the provisions of the New York statute making agreements to arbitrate enforceable are a matter of record. There are several sets of arbitration machinery in active operation in the needle industry. One such set has registered approximately six thousand complaints coming from both manufacturers and employees since June, 1924. Of this number, not more than one hundred and twenty-five cases, or two per cent of the total,

have reached the impartial chairman for his action, and less than ten per cent of these, or two-tenths of one per cent of all cases, were actually decided by him. There has been no strike or lockout in the industry since the arbitration machinery was first put in motion. In another association in the needle industry three thousand complaints were filed, of which only about one hundred and fifty came to the impartial chairman, all of which were decided. In no case has either side failed to carry out his decision. Counsel for one of the organizations stated that the decisions under the arbitration arrangement built up what he referred to as the "common law of the industry," and that with the establishment of precedents the settlement of controversies was effected almost without delay.

The impartial arbitrator in one of the needle industries said that the big thing in the idea of industrial arbitration is not so much the creation of a common law of industry as the creation of a state of mind that makes it possible for employers and employees to get together in a favorable atmosphere. One of the results of the arbitration program is that production is speeded up. Production has been increased in every shop of his entire organization. There is no penalty in the arbitration agreement for failure to abide by the award of the impartial arbitrator, but his award is always obeyed. There is no danger that any man in the union, or any party to the arbitration will dispute the judgment of the impartial chairman.

The operation of the arbitration machinery in the needle industry in New York has received favorable commendation from Julius Rosenwald, who says, "I am convinced that it is achieving excellent results." J. D. Lit of Philadelphia says, "The New York clothing industry is to be congratulated on having the vision and foresight to provide in advance the means of adjusting labor disputes. Incalculable loss to manufacturers and workers alike is avoided by the system of arbitration as represented by the impartial machinery."

William P. Goldman says, "We have demonstrated in the past three years to the retailers of the country that a continuous peace prevents violent fluctuations in prices and stabilizes costs, and, what is of prime importance, our method insures continuous and uninterrupted deliveries."

So far as I know no objection has been raised to the proposal to enact federal legislation. A word of caution has been expressed to the effect that progress be made slowly for fear that the suggested legislation may be construed as an invitation to workers to organize. The fact that some of the largest industries in the country which are without labor organizations have in effect such a program for the adjustment of industrial controversies seems to be a complete answer. In one of the largest packing concerns in the country in which the workers are unorganized, a complete system for adjustment is in effect and has been so productive of results that the machine has not been called upon to operate. All troubles have been settled without the necessity of action by the arbitrators. The very existence of the machine is in itself a safeguard against controversy. The workers are enthusiastic in their support of it.

There being no objection to the proposed legislation on its merits, why should its enactment not be immediately demanded of Congress? Minor objections should not lead us from the consideration of the main question, "Is industrial warfare to continue as the order of the day, or is a step to be taken toward its permanent eradication?' Are conditions so satisfactory now that the situation may be made worse rather than better by the enactment of legislation? The present proposal tends to create the will to peace. The *laisser-faire* doctrine can do more to retard the approach of peace than can the opposition of all the world's radicals.

The proposed legislation maintains inviolate the principle of freedom of contract. The arbitration proposed is voluntary —not compulsory. Neither party can be required to agree to arbitrate and arbitration cannot be demanded of either in the absence of agreement to arbitrate freely and voluntarily made. Fraud or compulsion when inducive to the execution of the agreement nullifies it. No agreement so made will be enforced by the courts.

It is not necessary to condemn either the courts or judicial administration in order to justify the suggestion that the settlement of group controversies be made outside of the court-room. The very word "litigation" is offensive to many. Even some lawyers dislike it. The due process of law guaranteed by the Constitution requires many formalities in pro-

cedure, necessarily causing delay, with its attendant inconvenience and expense, and occasional miscarriage of justice. Industrial controversies are peculiarly capable of speedy settlement. Arbitration might end many controversies before court proceedings could be instituted and many controversies are incapable of proper settlement by process of law. Most industrial disputes have their origin in industrial customs and practices with which courts and juries are wholly unfamiliar. It is safe to say that in most such cases more speedy and more exact justice can be done by an impartial arbitrator chosen by the parties. It has been said that an impartial arbitrator takes the place of a mediator rather than a judge.

There is no thought of abolishing the power of injunction in the courts. On the contrary, the award of an arbitrator is, in the language of Mr. Woll, to "have the status of law." This means that the award is legally enforceable. There is no question that the court will have the power to give effect to an agreement to arbitrate by requiring submission on the part of either party in default.

Even though no machinery for the enforcement of arbitration is contained in the agreements of the needle industry of New York, the existence of the New York arbitration law and of the agreements made enforceable by it has had a moral effect on the general industrial situation. It is doubtful if the manufacturers would have entered into the arbitration agreements if they were not known to be binding and enforceable. The present satisfactory conditions of the needle industry of the State of New York are due to the New York Arbitration Law enacted in 1920.

There are almost as many forms of machinery for arbitration as there are agreements to arbitrate. General provisions to submit to arbitration with the safeguards herein suggested are sufficient in practically all cases. The working-out of the details should be omitted, so that it may be possible to meet the conditions within each industry.

MUTUALISM

DONALD RICHBERG
Counsel for the Railway Unions, Chicago

IT is a great pleasure to discuss a non-controversial topic in the indolent hour that follows the efforts of a competent dietician to provide a non-controversial dinner. The bitter conflicts of opinion over religion, politics or sport will not arise to plague us this evening. Mohammedans, Buddhists, Pantheists, Atheists and Christians, early or late, wet or dry, can dwell together in unity. Republicans, with or without oil, Democrats, with or without beer, can stand on the same platform. The envenomed partisans of Gene Tunney and Jack Dempsey can count the seconds in unison and shake hands across the bloody chasm of the second civil war.

Tonight we meet in harmony of spirit to consider a subject of common interest, to advance a common purpose, to answer a common question; "How can we all make money?" The question comes to us jingling down the ages. Strangely, it is a question which has been answered more successfully each century. Other great questions have seemed to grow harder to answer. This one has become easier. Religion, politics, sport, art, science and education have presented their great questions in every age; but the answers are harder to find today than two thousand years ago. We know now that we know much less than we thought we knew, when we knew very little.

But the great question of commerce and industry grows easier to answer as the world grows older. Once it was believed that we could not all make money. It was thought necessary for most people to suffer and starve in order that a few very choice people might appear in the moving pictures of Nineveh. It was thought necessary to postpone the common acquaintance with gold until after death, when a rather large city with real gold pavements would be ready to accommodate those who had accepted the inevitable miseries of life without constantly complaining to the managers.

With the passage of time the number of the choice people who could really make money has steadily increased. The wealth of the noble few soon increased, so that more and more assistants were required to handle it. The inevitable result was that around the very choice nobility developed a rather choice circle of retainers; and around these developed a less choice circle of commercial gentlemen; and eventually around the commercial gentlemen developed a larger and more indiscriminate circle of those who, because they actually made a little money now and then, were called the "aristocracy of labor".

During each stage of this widening of the circles of money-makers, the answer to the question, "How can we all make money?", became easier, until at the beginning of the twentieth century the answer was so plainly written in the history of industry that even a few professional economists began to hint that it might be possible for everybody to make money. With customary caution, however, these advanced thinkers pointed out that such a result must come from the operation of economic laws and could not be brought about by any efforts of humanitarians to interfere with the laws of nature, which ordained that the strongest hog should always be the fattest. At the same time, fortunately, some political scientists discovered that both hogs and the economic laws of hogs were the product of society and government, which likewise could produce human beings and their economic laws. Even some of the white-rat-and-guinea-pig school of biologists conceded that *homo sapiens* was *sui generis* — or, in newspaper English, the less you think about hogs the more you will know about men. Advocates of restricted immigration and birth control have offered, for example, measures of self-protection which do not affect the economics of the pig pen. Thus it came about that some time after the world war many influential persons in America became convinced that modern industry held a solution for one age-old problem and a final answer to the question; "How can we all make money?" It was not only admitted but proclaimed by economists that man's productive capacity in the United States had now caught up with and passed his subsistence needs. The achievement described colloquially as "making money" is, of course, the

gathering of more coin than must be spent at once to satisfy subsistence needs. It was now apparent that industry could produce a surplus over necessaries for every worker.

The first reaction of many business men from this demonstration was an increased zest for foreign investment. It was true that American industry could still absorb a great deal of new capital. Yet, when the beneficent results of industrial progress in this country became visible to our business geniuses, the zeal for foreign missionary work followed inevitably. In the past, even when our city slums still moaned and prayed for Christian charity, we have generously spent millions of the surplus product of American labor to persuade the heathen in his blindness to cease bowing down to wood and stone, showing him the superior virtues of steel and marble. Even before elections in Chicago, Philadelphia and many other places, had become entirely safe for democracy, we had sent the army and navy to other countries to guarantee free elections and a conservative government.

The urge to help other people, even before our own people are taken care of, has long characterized the philanthropic leaders of American industry. Thus the rush of American money abroad was not surprising, after it became apparent that everybody could make money at home, if the industries of America were operated for the benefit of all the people of America. "Send the glad tidings far over the sea"—is a line from an old song that expressed the first notable response to the revelation of our industrial power. But the increase of foreign investment brought a host of new distressing problems. Foreigners could not pay interest on these investments, except by sending us their products and we had erected tariff walls to keep out these foreign products. With unexpected and embarrassing candor a group of bankers, realizing that foreign products must come in to pay interest on foreign loans, suggested that the tariff walls had better come down. Indignant captains of industry shouted back that foreign investments had better be summoned home—that they had joined foreign legions and were attacking the fortifications of their native land.

It is hard to tell what would have come of this fratricidal strife between American money at home and abroad if it had

not been for the genius of Aristides Midas, the great banker who called the first conference to consider "Mutualism". This was held shortly after the conclusion of President Coolidge's second term; the exact date now escapes me.

The program of Mutualism that developed out of that historic conference is presumably well known to all of you. The results of that program in the subsidence of industrial warfare and the consequent unprecedented prosperity of American industry are equally well known. But until this evening the opening address of Mr. Midas to the conference has never been made public. Through the courtesy of an investigating committee of the Senate, I have obtained a stenographic transcript of that address, which I will present herewith in condensed form.

It will be clear at once that the dogmatic generalities of Mr. Midas carried conviction only because of the speaker's personality and the vigor and financial power with which he supported his conclusions in subsequent discussions. I dare say that his remarks would arouse more dissent than approval in any such gathering as this today had not mutualism proved itself. We were all agreed that Henry Ford could not do what he did — until he did it. And when Aristides Midas proposed to out-Lincoln Henry Ford, he did not expect the immediate approval of his friends. He began his remarks as follows:

"Our future prosperity and happiness are menaced by many causes which all have their roots in one cause, the antagonism between management and labor. It has been and is the job of managers to coordinate the contributions of property-owners and workers. They have offered for money — indefinite profits and insecurity, or definite interest and some security. They have offered for men — wages and no security. They have explained their failure to satisfy either group by the demands of the other group, thereby making each group fear and dislike the other group, and increasing the difficulties of cooperation between them, and preventing a more effective coordination of their contributions.

"As a result, management has ceased to be the servant of capital and it refuses to serve labor. It has just become a self-blessed autocracy, that serves itself. Two things which

we need to protect in this country are the freedom of property and the freedom of labor — not one, but both. If property owners have brains enough to hang on to their own money and wage-earners have brains enough to hang on to their own labor, they must have brains enough to see that if they let management keep them apart, they will both lose out. If they work together, they can run the show.

"Now how did this thing happen?" asked Mr. Midas. And then he answered: "It was inevitable. Some gang has always run the show since we began to experiment with this game called civilization — a gang of kings or priests or barons or merchants or bankers. Now we have a gang of managers. I'm one of them. I know the gang. We don't run the show with our own money, although we have plenty for ourselves. We run the show with other people's money. Somebody has always done that. We are doing it today. It has been a great game. But I know a better game. I'm going to tell you about it.

"The eighteenth century is dead. The nineteenth century is dying. We and our children must live in the twentieth century. The dead and dying ideas of past centuries don't fit the living facts of this century. The old individualism in industry has passed away. Collectivism is a universal fact. Corporate organization dominates the scene. The ideas of eighteenth-century individualism no longer fit our needs. The ideas of nineteenth-century socialism never did fit our needs. The twentieth century demands mutualism, that is, genuine cooperation between property-men and labor-men in developing a common program for the benefit of everybody, and the employment of managers to carry out the program.

"First. We should expurgate from our libraries all the writings of Karl Marx and his disciples. The doctrine of the inevitable class struggle which has impregnated the minds of financiers and business leaders has been proved unsound; and it is a serious impediment to social progress for the owners and managers of industry to continue to look upon the workers as a hostile class of society. Fortunately, the vast majority of workers in America have never adopted the Marxian philosophy, but have advocated cooperation. Therefore, if cooperation is now advocated by property-men, a cordial response from labor-men is assured.

"Second. Why do we need cooperation? Money has always been able to hire brains. Why stop to be polite and to confer and consult? Why not go on buying what we need? We know the market price of muscle and brains and genius. We can buy all of these things that we need. But — we have recently discovered that the game has become too easy and that all the fellows who really count are bored with it and are looking for other games to play. Many of them even prefer golf. It's only the raw, uneducated crowd of would-be-managers that are getting a thrill. That's why I'm here to propose a new game — because I want to have a good time again before I die.

"Third. Why is the old game too easy now? Because competition in the production and distribution of staple goods and services has outlived its usefulness as an entertainment for ambitious men. Before we were able to produce enough necessaries to assure everybody a decent living a fight for subsistence was inevitable. Until we could get all that we needed, our kind would fight to get all that we could. But after we have more food and shelter and clothing than we can use, what do we want? Peace of mind — happiness — something to do that is a good game. There isn't any fun in taking food and shelter and clothing away from other people, is there? How many people will admit that they enjoy that game — in the twentieth century?

"We can now produce and distribute among the people of the United States all the staple goods and services they need. There's no reason to fight over that job — any more than to fight over supplying water in our cities. We ought to organize money and men to do the job completely and to do it better than we're doing it now. But there's no sense in fighting over it. When we could only produce a thousand good homes for every twelve hundred families, even a Quaker had to fight. But now, when we can produce twelve hundred good homes for every thousand families, we ought to get together so as to do the job as well and as quickly as we can and then fight about something worth fighting about, so that we can enjoy the struggle. I've lost all enjoyment of making money out of misery and I've lost all respect for men who are willing to do it.

"Fourth. Competition in improving old services and in producing new services is the game for this century. We used to buy crackers out of a barrel, soggy and dusty and broken. Now we buy them in boxes, crisp and clean and whole. That's progress — if we don't pay ten cents for two cents worth of crackers. We used to go to lots of trouble and stand lots of boredom seeking entertainment and relaxation. Now we can turn on the radio — and thank God! we can turn it off. That's progress — if we don't pay a hundred dollars for a ten-dollar instrument. There are fortunes still to be made by men who will improve an old service or produce a new one. But there isn't much competition and adventure, and there ought not to be any real money-making in just doing the same thing over again in the same way. Standardized pay is enough for a standardized job. No reason why a man should get wealthy making and distributing the same old bread and shoes and pig iron in the same old way.

"Fifth. How are we going to develop in the twentieth century the new decent competition in giving service and get rid of the old indecent competition in grabbing things, which was once inevitable and is inevitable no longer? We need, at the outset, to recognize one simple principle. If we want to do a man a service, the first thing to find out is what he wants. I think I hear some one asking with a sneer, 'Who is the object of this noble inquiry?' And then I think I hear his neighbor reply with mock solemnity, 'The ultimate consumer'. Well, that's not my answer. I've never been able to locate an ultimate consumer. But I've never yearned to serve those people who seemed to be nearly ultimate consumers — such as the alimony ladies and male butterflies of Florida and New York.

"Most of the people who are called consumers are primarily workers. They work before they consume and they consume according to the market value of their work. If we find out what the workers want to work for, we will find out what consumers want to consume. In proportion as we satisfy the workers we will satisfy the consumers — for they are the same persons. All of which shows that if we had an adequate and comprehensive organization of labor we would have the means of determining and satisfying consumer demand to an extent heretofore impossible. The prime need of the present time is universal and effective labor organization."

At this point in Mr. Midas' address, I am informed that five members of the conference were stricken with apoplexy and that a score of others fled gasping to the outer air. After a short recess the conference reassembled in a more liberal atmosphere; Mr. Midas remarked parenthetically that hardened arteries in the brain were peculiarly dangerous to individuals and to society, and then continued his demand for bigger and better labor organizations.

"I have not become an advocate of industrial unionism or company unionism or trade unionism or any particular form of unionism", he said. "I have become an advocate of natural and universal labor organization, because I have come to see that we can't do a good job investing money or managing property without the aid of adequate labor organization. Furthermore, I want labor organizations to run themselves, so they will be forced to accept some responsibility in balancing labor power and consumer demand. I know that I don't know enough to do the job alone and to do it right. I know that no group of men can advise me adequately unless they include the actual and responsible representatives of labor power and consumer power.

"The managers of industry today ought to be statesmen, because the welfare of the country rests upon their larger decisions. Not merely physical well being, but social policies and social ethics are determined by those whose power over the standards of daily living is greater than that of government. But it is democratic statesmen we need, not dictators. Does any man here doubt that the forces moving in modern life and the powers available for human direction are too great and too complicated to be safely controlled by any one man or any small group of men? Does anyone think that any sane man or any small group of sane men would aspire to dictatorship in the modern world? A would-be dictator must be inspired by delusions of grandeur, willing to seize the thunderbolts of Jove, reckless of when or where he may unloose a storm to devastate the land.

"I hold no brief for any leader of organized labor", said Mr. Midas, "least of all for any who think and talk about dictatorships. The labor autocrat and the property autocrat are alike the foes of industrial cooperation. They are broth-

ers under—and in—the skin. I am not enamored of traditional trade unionism, because although there is still a field for craft organization, it is only a part of the labor field and the technique of traditional trade unionism is often an impediment to effective organization. But there are at least two great virtues in trade unionism that should be emphasized and are fundamental to sound labor organization: first, the organization of those of immediate common self-interest; second, the organization of self-governing small units and the federation of these into larger units whereby wider common self-interests may be conserved. The workers of a craft, the employees of one employer, the wage-earners of one industry, have various common interests. Factory workers, mine workers, agricultural workers, are larger groups that have some common interests and include many separate interests. Employers, managers and investors have similar interests in small and large groups. They organize now to express these interests and they will organize more effectively when more intensive organization of labor stimulates them.

"Many leaders of organized labor and organized capital have long agreed that the Sherman Anti-Trust Law should be repealed. I would go further and say that all such anti-combination laws, written in the legislatures and the courts, should be wiped out and that organizations and combinations of all forms of self-interest in industry should be encouraged, so that organizations of economic power may provide natural balances of power and may deal freely with each other, each conscious of its strength in what the members have to give, and conscious of its weakness in what they must seek from others.

"We are in fact utterly dependent upon each other in modern society. The man seeking only a few services from his fellow men realizes necessarily only a few of the possibilities of modern life. The fuller the life we lead the more we need the services of others. If we will provide ourselves with the means of mutual exchange of information, and mutual understanding of different points of view, we will be able to obtain for ourselves and for others much more satisfaction out of life than will be possible so long as we deny ourselves the means of such an interchange.

"Permit me to summarize, in a few words the choice we face in meeting the needs of industry. If we organize other men to serve our purposes we make ourselves responsible for the consequences to them, for the misery or happiness of their lives; and they are relieved of responsibility for the consequences to us. They owe us no debt of gratitude for having taken away their liberty, which is more precious than anything we may give back. It is only when we are all freely organized to serve our own purposes that we become responsible for ourselves and mutually responsible to each other. That it what I call mutualism."